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IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

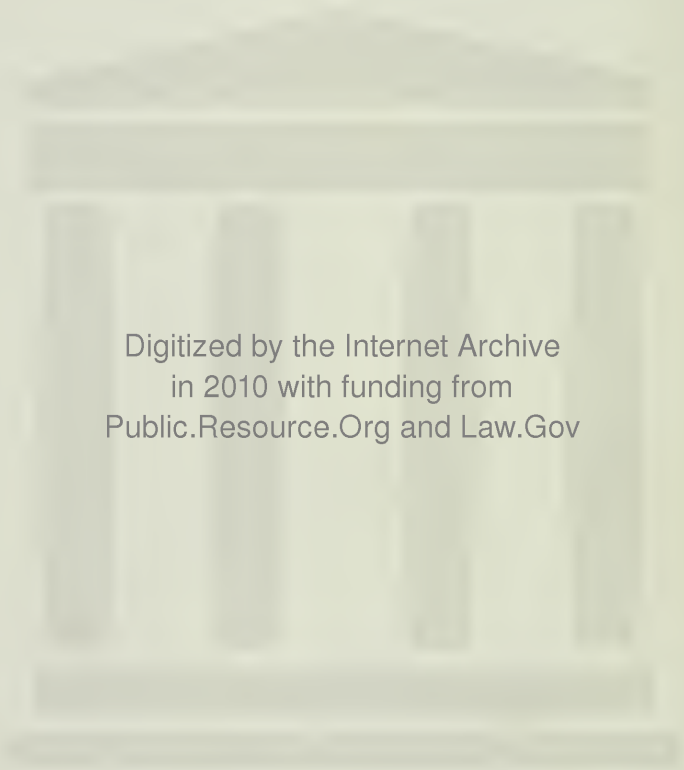
NINTH CIRCUIT.

F. V. McDONALD,
Plaintiff in Error,
vs.
D. B. AND KATE E. HANNAH,
Defendants in Error.

RECORD.

W. SCOTT BEEBE,
J. C. STALLCUP,
C. R. HOLCOMB,
Attorneys for Plaintiff in Error.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET,
1893.



Records of Births
Book of Infants
14

IN THE

UNITED STATES

IRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

McDONALD,
Plaintiff,
vs.
[illegible]. HANNAH AND KATE E. HANNAH,
Defendants.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.—WESTERN DIVISION, FEBRUARY TERM, 1892.

Be it remembered: That on the 21st day of December, 1891, there was duly filed in said Circuit Court of the United States for the District of Washington, Western Division, a complaint in words and figures as follows, to-wit :

In the Circuit Court of the United States for the District of Washington.—Western Division.

F. V. McDonald,
Plaintiff,
vs.
Dolphus B. Hannah and
Kate E. Hannah,
Defendants.

I.

The above named plaintiff, F. V. McDonald, alleges: That he is a citizen of the State of California, and that the defendants are citizens of the State of Washington.

II.

That the plaintiff is owner in fee of, and has a right to, and is entitled to the possession of the real property situated in the City of Tacoma, State of Washington, and described as follows: Commencing fifty-three and one-third ($53\frac{1}{3}$) chains north, and six (6) chains east of the southwest corner of section five (5), in township twenty (20) north of range three (3), east of the Willamette meridian; thence running east six chains; thence south six and two-thirds ($6\frac{2}{3}$) chains; thence west six (6) chains; thence north six and two-thirds ($6\frac{2}{3}$) chains to the place of beginning.

III.

That the defendants are in the actual possession of said premises and wrongfully withhold the same from the plaintiff. That about the month of December, 1888, while plaintiff was seized in fee of said premises, said defendants unlawfully entered into the possession thereof and still continue to wrongfully withhold the same from the plaintiff.

IV.

That the property described in this complaint and involved in this action exceeds in value the sum of five thousand dollars ($5000.00.)

V.

Plaintiff asks judgment against defendants

First: For the possession of the property described in this complaint.

Second: For the costs and disbursements of this action.

JOHN C. STALLCUP & W. SCOTT BEEBE,
Attorneys for Plaintiff.

State of Washington, } ss.
County of Pierce. }

I, J. C. Stallcup, being first duly sworn, say, that I am one of the attorneys for the plaintiff herein, and that the foregoing complaint is true as I verily believe, and that I make this verification because the plaintiff is not within this state. JOHN C. STALLCUP.

Subscribed and sworn to before me this 21st day of December, 1891. A. REEVES AYRES, [*Seal.*]
U. S. Commissioner.

ENDORSEMENT.

No. 113. Law. F. V. McDonald *vs.* Dolphus B. Hannah and Kate E. Hannah. Complaint. Filed December 21, 1891. A. Reeves Ayers, clerk. W. Scott Beebe and J. C. Stallcup for plaintiff.

And, afterwards, to-wit: On the 21st day of December, 1891, there was duly issued out of said court, a summons in words and figures as follows, to-wit:

UNITED STATES OF AMERICA.

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH JUDICIAL CIRCUIT, DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. McDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH, *Defendants.*

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the City of Tacoma, Pierce county, State of Washington.

The President of the United States of America, greeting:
To Dolphus B. Hannah and Kate E. Hannah:

You are hereby required to appear in the Circuit Court of the United States, Ninth Judicial Circuit, District of

Washington, Western Division, at the City of Tacoma, within twenty days after the service of this summons upon you, if served in said County of Pierce; or, if served in any other county, then within thirty days after the day of service, and answer the complaint of the above named plaintiff, now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you. And unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in said complaint.

Witness, the Honorable Melville W. Fuller, chief justice of the supreme court of the United States, and the seal of said circuit court, this 21st day [*Seal.*] of December, in the year of our Lord one thousand, eight hundred and ninety-one, and of our Independence the 116th.

A. Reeves Ayres, *Clerk.*

United States Marshal's Office,
District of Washington.

I hereby certify that I received the within writ on the 21st day of December, 1891, and personally served the same on the 21st day of December, 1891, by delivering to and leaving with Dolphus B. Hannah and Kate E. Hannah, said defendants named therein personally, at Tacoma, County of Pierce, in said district, a certified copy thereof, together with a copy of the complaint, certified to by A. Reeves Ayres, and attached thereto.

December 22, 1891.

Thos. R. Brown, *U. S. Marshal.*
By D. G. Lovell, *Deputy.*

MARSHAL'S FEES.

To service two summons and complaint	$8 00
To milage, two miles, at 12c. per mile	24
	$8 24

ENDORSEMENT.

No. 113. U. S. Circuit Court, Ninth Circuit, District of Washington, Western Division. F. V. McDonald, *vs.* D. B. Hannah, *et ux.* Original summons. W. Scott Beebe, John C. Stallcup, plaintiff's attorney. Filed December 23, 1891. A. Reeves Ayers, clerk.

And, afterwards, to wit: on the 19th day of January, 1892, there was duly filed in said court in said cause an answer to the complaint in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington.—Western Division.

F. V. McDonald, *Plaintiff*,
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants*.
No.....Answer.

Come now the above named Dolphus B. Hannah and Kate E. Hannah, and for answer to the complaint of the plaintiff herein, they allege as follows:

I.

They deny each and every allegation contained in paragraph second of said complaint.

II.

They admit that they are in the actual possession of said premises, but deny that they wrongfully withhold the same from plaintiff.

III.

They deny that they wrongfully entered into the possession of said premises, and deny that they wrongfully withheld the same from plaintiff.

And for further answer and defense these defendants allege:

I.

That on the 5th day of November, A. D. 1881, all and singular the premises described in plaintiff's complaint were within the limits established by an act of the legislative assembly of the Territory of Washington, approved November 5th, 1881, entitled: "An act to confer a city government upon New Tacoma," as the corporate limits of

New Tacoma; and that under and by virtue of said act of said legislative assembly, the City of New Tacoma was duly incorporated.

II.

That under the provisions of section thirty-four of said act, the city government of New Tacoma had power and authority to assess, levy and collect taxes for general municipal purposes upon all property, both real and personal, situate within the corporate limits, which was by law taxable for territorial and county purposes.

III.

That in the year A. D. 1882, there was duly levied and assessed by the city government of New Tacoma a tax upon all the real estate within the limits of said city, including the premises described in the complaint herein, for general municipal purposes. That the said premises, being so, as aforesaid, within the corporate limits of New Tacoma, were by law taxable for territorial and county purposes, and that one Mary A. Givens, was then and there the record owner, and also the owner in fact, of said premises.

IV.

That in the year A. D. 1882, there was duly levied and assessed by the city government of New Tacoma, a tax upon all the real estate within the limits of said city, including the premises described in plaintiff's complaint, for general municipal purposes, and that all and singular the said premises were duly assessed to said Mary A. Givens, for said year.

V.

That under section sixty-two of said act incorporating New Tacoma, it is provided that the council of said corporation must provide by ordinance within what time all municipal taxes, whether general or special, must be paid to the treasurer, and when the taxes not so paid, become delinquent; also fixing the time when the tax roll must be returned to the council.

VI.

That in pursuance of the provisions of said section sixty-two the council of said corporation did provide by

ordinance that all municipal taxes must be paid to the treasurer by the 31st day of December, 1882, and that all taxes not so paid should be delinquent; which said ordinance was duly passed the 24th day of October, 1882.

VII.

That said premises be so, as aforesaid, assessed to the said Mary A. Givens.

VIII.

That thereafter the city council of said city ordered the clerk of said city to deliver to the tax collector of delinquent taxes, (the sheriff of the county) the tax roll of 1882, upon which the said property, described in the complaint herein, was so assessed to the said Mary A. Givens, as aforesaid, and caused to be attached thereto a warrant to the said sheriff of Pierce county, authorizing the said sheriff to collect all delinquent taxes, as provided by law, and in accordance with the provisions of sections sixty-three of said city's charter, and section twenty-nine hundred and three, of chapter twenty-five of the Code of Washington.

IX.

That in pursuance of the directions and instructions, so given by said city council, the clerk of said city did, on the 23d day of January, 1883, deliver to the sheriff of Pierce county the duplicate assessment roll, containing a list of all persons and property owing taxes in and to the said City of Tacoma, together with the costs and charges thereon, which said duplicate city assessment roll did then and there include the property described in the complaint, herein the same being assessed thereon for the year ending December 31, 1882, for said municipal taxes, to the said Mary A. Givens.

X.

That on the 2d day of April, 1883, the said sheriff of Pierce county entered in the duplicate assessment roll, immediately following his supplemental assessment, the affidavit required by section twenty-nine hundred and fifty of the Code of Washington territory, to the effect that after due and diligent search no personal property could be found to pay the taxes assessed against the persons

and property described in said duplicate assessment roll remaining unpaid, and that the taxes due from said Mary A. Givens, assessed on the land described in plaintiff's complaint, had not been paid, and that the same then and there appeared on said duplicate assessment roll as delinquent and wholly unpaid; that the said taxes, so due from said Mary A. Givens and assessed on said land, were then delinquent and unpaid, and that no personal property could be found belonging to said Mary A. Givens out of which said tax could be made. That under the provisions of section twenty-nine hundred and sixteen of the Code of Washington territory the said sheriff gave public notice of the sale of the real property, described in said delinquent list, for the total amount of taxes then due thereon, including printing, interest and costs to date of sale, by publishing for three successive weeks, immediately prior to the first Monday in May, 1883, the said delinquent list, in the manner provided by law, in New Tacoma, Pierce county.

XI.

That said delinquent list contained a notification that all real estate, described thereon, on which the taxes of the preceding year, to-wit: The year 1882, had not been paid would be sold at public auction to satisfy the taxes, penalty, interest and costs due the city from the owners thereof for said year at New Tacoma, in front of the court house door, in said county and territory; that said sale would commence on the first Monday in May and continue until said real estate was sold, as required by law, which notice, so published as aforesaid, contained a description of all the property to be sold, and the names of the persons to whom said property was assessed; and that the said delinquent list, so published as aforesaid, contained a description of the property described in plaintiff's complaint, assessed to the said Mary A. Givens.

XII.

That in pursuance of said notice, so published and given as aforesaid, the said sheriff did, on the 7th day of May, 1883, offer the said tract of land, described in plaintiff's complaint, for sale between the hours of ten o'clock A. M. and three o'clock P. M., of that day, to pay said taxes and charges due thereon, at public auction in front of the

court house door in said New Tacoma ; that at said sale D. B. Hannah, one of the defendants herein, was the bidder who was willing to take the least quantity of, or the smallest portion of the interest of said land, and pay the taxes, costs and charges due thereon, including one dollar for the certificate of sale, which amounted to the sum of four and 78-100 dollars.

XIII.

That at said sale the said D. B. Hannah purchased the same, and then and there paid the full amount of said taxes, costs and charges, and that thereupon the treasurer of said County of Pierce delivered to said D. B. Hannah the usual certificate of sale; and the said D. B. Hannah thereby became the purchaser of the land described in plaintiff's complaint, so sold for taxes as aforesaid. That the said tract was sold subject to redemption, pursuant to the statutes in such cases provided, but that no person redeemed said property from said sale, and no redemption was ever made thereof.

XIV.

That on the 2d day of April, 1886, the said D. B. Hannah duly assigned said certificate of sale, and all his rights thereunder, to one W. B. Kelly, as appears from said certificate of sale, and the assignment thereof.

XV.

That on the 16th day of September, 1886, one Lewis Byrd, then being the sheriff of said County of Pierce, Territory of Washington, by virtue and in pursuance of the statutes in such cases made and provided, did, as such sheriff, in the name of the Territory of Washington, execute and deliver to said W. B. Kelly a deed conveying to said W. B. Kelly, his heirs and assigns forever, all and singular the premises described in plaintiff's complaint, in the manner and form provided by law.

XVI.

That the said deed, so as aforesaid made, executed and delivered by said sheriff to said W. B. Kelly, was duly recorded in the auditor's office of said Pierce county, Washington territory, on the 9th day of October, 1886, in book nineteen of deeds, at pages 706 *et seq.*

XVII.

That thereafter and on the 1st day of March, 1887, said W. B. Kelly and Mary M. Kelly, his wife, for and in consideration of the sum of one thousand dollars, conveyed to the defendant, Dolphus B. Hannah, by warranty deed, all and singular the premises described in plaintiff's said complaint, since which time defendants have been in the open, notorious and exclusive possession of said premises, and have made permanent improvements thereon, costing five thousand dollars.

XVIII.

And these defendants further say that plaintiff's right to maintain his action to recover the premises described in his complaint herein, so as aforesaid sold for taxes, is barred by the provisions of section twenty-nine hundred and thirty-nine of the Code of Washington, which provides that all suits for the recovery of lands sold for taxes must be commenced three years from the date of the recording of the tax deed.

WHEREFORE: These defendants pray judgment against the plaintiff to be dismissed hence without day, and for their costs and disbursements, herein.

JUDSON & SHARPSTEIN,

Attorneys for Defendants.

State of Washington, }
County of Pierce. } *ss.*

D. B. Hannah being duly sworn, on oath said: That he is the defendant in the above action; that he has read the foregoing answer, and knows the contents thereof, and that he believes it to be true.

D. B. HANNAH.

Subscribed and sworn to before me this 11th day of January, 1892.

J. A. WINTERMUTE,

[*Seal.*] *Notary Public, residing at Tacoma, Pierce county, Washington.*

ENDORSEMENT.

No ..... In the U. S. Circuit Court of the District of Washington, Western Division. F. V. McDonald, plaintiff, *vs.* D. B. Hannah, *et als*, defendants. Answer. Service by receipt of a copy, admitted at Tacoma, this 9th day of January, A. D. 1892. J. C. Stallcup, attorney for plaintiff. Filed January 19, 1892. A. Reeves Ayres, clerk. Judson & Sharpstein, attorneys for defendants, Hannah.

And, afterwards, to-wit: On the 1st day of February, 1892, there was duly filed in said court, in said cause, a reply to the answer in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. McDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH, *Defendants.*

Reply.

Now comes the plaintiff, and replying to the affirmative matter in the said further answer and defense in the answer of the said defendant's herein, admits that the said premises described in the plaintiff's complaint, were within the corporate limits of the said Tacoma; that in the said year A. D. 1882, they were, by law, taxable for territorial and county purposes; and that one Mary A. Givens was then and there the record and real owner thereof; but this plaintiff is informed, and believes, and accordingly alleges, that the things in said complaint alleged to have been done, were not done; and denies the allegations of said complaint, contained in the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th paragraphs thereof, excepting the allegations in the said 3d paragraph above expressly admitted. And plaintiff is informed and believes, and so alleges, that without right, did the defendants pretend to have a tax deed of said premises, and well knowing that they had no right to the said premises, by virtue of said pretended tax deed, nor otherwise, took forcible possession of the said premises

described, and erected thereon a temporary dwelling place, for the purpose of enabling them to forcibly hold said premises against the plaintiff, and of little or no permanent value to the said premises, and of a cost less than fifteen hundred dollars.

W. Scott Beebe and
Jno. C. Stallcup,
Plaintiff's Attorneys.

State of Washington, }
County of Pierce, } *ss.*

John C. Stallcup, on his oath says: That he is one of the attorneys for the said plaintiff in the said action, duly authorized in the premises; that the said plaintiff is a non-resident of said State of Washington, and is now absent from said state; that he has read over the foregoing reply of the said plaintiff; that the same is true according to his best knowledge and belief.

John C. Stallcup.

Sworn to and subscribed by said John C. Stallcup, before me this 1st day of February, A. D. 1882.

[*Seal*] Edward Phillips,
Notary Public residing at Tacoma, Wash

Received copy of the foregoing reply, this first day of February, A. D. 1892. Judson & Sharpstein,
Attorneys for Defendants.

ENDORSEMENT.

F. V. McDonald *vs.* Dolphus Hannah and Kate Hannah. Reply. Filed February 1, 1892. A. Reeves Ayres, clerk. W. Scott Beebe and John C. Stallcup for plaintiff.

And, afterwards, to-wit: On Monday, the 8th day of February, 1892, the same being the fifth judicial day of the regular February term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to-wit:

F. V. McDonald,
Plaintiff,
vs.
Dolphus B. Hannah and Kate E. Hannah,
Defendants.

Now, on this 8th day of February, 1892, upon application of Judson & Sharpstein, solicitors for the defendants, plaintiff's counsel consenting thereto.

It is ordered that the defendants may have leave to file an amended answer herein within one day from this date.

And afterwards, to-wit: On the eighth day of February, 1892, there was duly filed in said court in said cause an amended answer in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington.—Western Division.

F. V. McDonald, *Plaintiff*,
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants*.
Amended Answer.

Come now the above-named defendants, and, by leave of court first obtained, filed this, their amended answer, to the complaint of the plaintiff herein, and answering said complaint.

I.

Deny each and every allegation contained in the second paragraph of said complaint.

II.

Admit that they are in the actual possession of the premises described in plaintiff's said complaint, but deny that they wrongfully withhold the same from said plaintiff.

III.

They deny that plaintiff was ever seized of the premises described in said complaint, and deny that they wrongfully entered into possession of said premises, and deny that they wrongfully withhold the same from plaintiff.

And for a further answer and defense these defendants allege:

I.

That at all times herein mentioned, all and singular the premises described in plaintiff's complaint, were within the

limits established by an act of the legislative assembly of the Territory of Washington, approved November 5th, 1881, and entitled, "An Act to confer a City Government upon New Tacoma," as the corporate limits of "New Tacoma;" and that under and by virtue of said act of said legislative assembly the City of "New Tacoma" was duly incorporated.

II.

That under the provisions of sub-division 1 of section 34 of said act the city government of "New Tacoma" had the power and authority to assess, levy and collect taxes for general municipal purposes upon all property, real and personal, within the corporate limits of said city, which were, by law, taxable for territorial and county purposes, and by section 50 of said act it is provided that the assessment of property must be made in the manner prescribed by law for assessing property for territorial and county purposes. That the time of making such assessment, and the return thereof, and for applying to the council for the revision thereof, must be prescribed by ordinance, and that in accordance with the provisions of said act said city council did enact an ordinance, entitled: "Ordinance No. 58, to Prescribe the Time and Manner of Making the Annual Assessment of Taxable Property in the City of New Tacoma," passed and approved June 23d, 1882, which said ordinance provided that the time for making the annual assessment for the year 1882, should commence on the 31st day of May, and end on the 15th day of July of said year; that the assessor should make due return of his assessment roll to the city clerk on or before the 25th day of July of said year; that the said city council should meet on the 31st day of July of said year, at 7:30 P. M., to sit as a board of equalization for the revising of said roll, and should continue in session until the revision of the same was completed, and that due notice of the meeting of said board should be given in a newspaper, published and of general circulation, in said city.

III.

That the premises described in plaintiff's complaint were within the corporate limits of said City of New Tacoma, and were by law taxable for the territorial and county purposes.

IV.

That in the year A. D. 1882, there was duly levied and assessed by said city government of New Tacoma, a tax upon all the real estate within the corporate limits of said city, including the premises described in plaintiff's complaint, for general municipal purposes, and that all and singular the said premises were duly assessed to one Mary A. Givens for said year.

V.

That under the provisions of section 62, of said act it is provided that the council of said "New Tacoma" must provide by ordinance within what time all municipal taxes must be paid to the treasurer and that the tax not so paid shall become delinquent. Also fixing the time when the tax roll must be returned to the city council.

VI.

That in pursuance of the provisions of said section 62 the council of said City of "New Tacoma" did provide by ordinance that all municipal taxes should be paid to the treasurer of said city on or before the 31st day of December, 1882, and that all taxes not paid at that time shall be delinquent, which said ordinance was duly passed the 24th day of October, 1882, and is entitled : "An Ordinance Levying the Annual Tax for General Municipal Purposes for the Year A. D. 1882."

VII.

That taxes amounting to the sum of three dollars, were levied and assessed against the premises described in said complaint, but that the same were not paid within the time prescribed by said ordinance; and thereafter the city council of said city ordered the clerk of said city to deliver to the sheriff of the County of Pierce, Territory of Washington, he being the collector of delinquent taxes of said City of "New Tacoma," said tax roll of 1882, upon which the said property described in the complaint herein, was so assessed to the said Mary A. Givens, as aforesaid, and caused to be attached thereto a warrant directed to the said sheriff of Pierce county, authorizing said sheriff of Pierce county to collect all the delinquent taxes, as provided by law, and in

accordance with the provisions of section 63 of said act of the legislature and the provisions of section 2903 of chapter 225 of the Code of Washington territory of 1881.

VIII.

That in pursuance of the directions and instructions so given by the said city council as aforesaid, the clerk of said city did, on the 23d day of January, 1883, deliver to the said sheriff of Pierce county the duplicate assessment roll of said city containing a list of all persons and property owing taxes in and to the said City of "New Tacoma," together with the costs and charges thereon, which said duplicate city assessment roll did then and there include the property described in the complaint herein, the same being assessed thereon for the year ending December 31, 1882, for said municipal taxes, to the said Mary A. Givens.

IX.

That on the 2d day of April, 1883, the said sheriff of Pierce county, as collector of the delinquent taxes of said city, entered in the said duplicate assessment roll, immediately following his supplemental assessment, the affidavit required by section 2915 of the Code of Washington territory, to the effect that after due and diligent search no personal property could be found to pay the taxes assessed against the persons and property described in said duplicate assessment roll remaining unpaid.

X.

That the taxes due to the city from the said Mary A. Givens, assessed on the land described in plaintiff's complaint, were not paid, and the same then and there appeared on said duplicate assessment roll as delinquent and wholly unpaid.

XI.

That under the provisions of section 2916, of the Code of Washington territory, of 1881, the said sheriff gave public notice of the sale of the real property described in said delinquent list for the total amounts of taxes due thereon, including the printing, interest and costs to date of sale, by publishing the same for three successive weeks

immediately prior to the first Monday in May, 1883, in the official paper of said county, said paper being published in said City of New Tacoma, in the manner provided by law.

XII.

That said delinquent list contained a notification that all real estate, described thereon, on which the taxes for the preceding year, to-wit: the year 1882, had not been paid, would be sold at public auction to satisfy the taxes, penalty, interest, costs and charges due to the city from the owners thereof for said year, at "New Tacoma," in front of the court house door, of the County of Pierce, and Territory of Washington; that said sale would commence on the first Monday of May, 1883, and continue until said real estate was sold, as required by law, which notice, so published as aforesaid, contained a description of all of the property to be sold and the names of the persons to whom said property was assessed; and that the said delinquent list, so published as aforesaid, contained a description of the property described in plaintiff's complaint, assessed to the said Mary A. Givens.

XIII.

That in pursuance of said notice, so published and given as aforesaid, the said sheriff did, on the 7th day of May, 1883, said day being the first Monday of May, of the said year 1883, offer the said tract of land described in plaintiff's said complaint, for sale between the hours of ten o'clock A. M. and three o'clock P. M., of said day, to pay said taxes and charges due thereon, at public auction in front of the court house door in said "New Tacoma," and that at said sale D. B. Hannah, one of the defendants herein, was the bidder who was willing to take the least quantity of, or the smallest portion of the interest in said land, and pay the taxes, costs and charges due thereon, including one dollar for the certificate of sale, in all amounting to the sum of four dollars and seventy-eight cents ($4.78.)

XIV.

That at said sale the said D. B. Hannah purchased the said premises, and then and there paid the full amount of

said taxes, costs and charges due thereon, and that thereupon the treasurer of said County of Pierce delivered to said D. B. Hannah the usual certificate of sale, and by virtue thereof the said D. B. Hannah became the purchaser of the land described in plaintiff's complaint, so sold for taxes as aforesaid.

XV.

That on the 2d day of April, 1886, the said D. B. Hannah duly assigned the said certificate of sale, and all his rights thereunder, to one W. B. Kelly.

XVI.

That said premises were not redeemed by any person within the time limited by law, and that thereafter and on the 16th day of September, 1886, one Lewis Byrd, then being the sheriff of the County of Pierce, Territory of Washington, by virtue and in pursuance of the statutes, did, as such sheriff, in the name of the Territory of Washington, execute and deliver to the said W. B. Kelly, in the manner and form provided by law, a deed conveying to the said W. B. Kelly, his heirs and assigns forever, all and singular the premises described in plaintiff's complaint.

XVII.

That said deed, so as aforesaid made, executed and delivered by said sheriff to the said W. B. Kelly, was duly recorded in the office of the auditor of said Pierce county, Washington territory, on the 9th day of October, 1886, in volume 19 of deeds, at pages 706, 707 and 708.

XVIII.

That thereafter and on the 1st day of March, 1887, said W. B. Kelly and Mary M. Kelly, his wife conveyed to the defendant, Dolphus B. Hannah, by warranty deed, all and singular the premises described in plaintiff's complaint, since which time defendants have been in the open, notorious and exclusive possession of said premises, and have made permanent improvements thereon costing five thousand dollars.

And for a further answer and defense, and by way of bar to the maintenance of this action, defendants allege:

That plaintiff is barred of his right to maintain this action by the provisions of section 2939 of the Code of Washington territory of the year 1881, which said section provides that any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid on the land redeemed as provided by law, shall be commenced within three years from the time of recording tax deed of sale.

Wherefore, defendants pray judgment against plaintiff to be dismissed hence without day; that plaintiff's action be dismissed, and that defendants do have and recover their costs and disbursements herein.

JUDSON & SHARPSTEIN,
Attorneys for Defendants.

State of Washington, }
County of Pierce. } *ss.*

D. B. Hannah being duly sworn, on oath says: That he is one of the defendants in the above action; that he has read the foregoing amended answer, and knows the contents thereof, and that he believes it to be true.

D. B. HANNAH.

Subscribed and sworn to before me this 8th day of February, 1892.

W. C. SHARPSTEIN, *Notary Public.*

ENDORSEMENT.

No..... In the U. S. Circuit Court of the District of Washington, Western Division. F. V. McDonald, plaintiff, *vs.* Dolphus B. Hannah and Kate E. Hannah, defendants. Amended answer. Service by recept of a copy, admitted at Tacoma this 8th day of February, A. D. 1892. ———— attorney for plaintiff. Received copy this 8th February, 1892. J. C. Stallcup, for plaintiff. Filed February 9, 1892. A. Reeves Ayres, clerk. Judson & Sharpstein, attorneys for defendants.

And, afterwards, to-wit: On the 15th day of February, 1892, there was duly filed in said court in said cause, a reply to the amended answer in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Washington.— Western Division.

F. V. McDonald, *Plaintiff*,
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants*.

Reply.

Now comes the plaintiff, and replying to the affirmative matter in the said further answer and defenses in the amended answer of the said defendants herein, admits that the said premises described in the plaintiff's complaint were within the corporate limits of the said Tacoma; that in the said year, A. D. 1882, they were by law taxable for territorial and county purposes; and that one Mary A. Givens was then and there the record and real owner thereof; but this plaintiff is informed and believes, and accordingly alleges, that the things in said further answer and defenses alleged to have been done, were not done, and denies all of the allegations of said answer. And plaintiff is informed and believes, and so alleges, that without right did the defendants wrongfully pretend to have a tax deed of said premises, while in truth and fact they had no deed conveying any interest whatever in said premises described, and well knowing that they had no right to the said premises by virtue of said pretended tax deed, nor otherwise, took forcible possession of the said premises described, and erected thereon a temporary dwelling place for the purpose of enabling them to forcibly hold said premises against the plaintiff, and of little or no permanent value to the said premises, and of a cost less than fifteen hundred dollars.

And replying further to the said answer and defenses set up in said answer of defendants, this plaintiff denies the allegations thereof, and is informed and believes, and so specifically alleges, that the said premises described in the complaint and in the said pretended tax deed referred

to in said answer, were not assessed for city taxes, nor were they subject to sale for city taxes, for the years 1881, 1882 and 1883; that they were not assessed for city taxes for nor during either of the said years; that they were not advertised for sale for taxes at all for either of said years, nor were they at all advertised for sale for taxes on the 7th day of May, A. D. 1883, nor for any other day of that year, or any other year; that they were never advertised for, nor sold for taxes of any kind whatever; that all the taxes assessed against the said premises for the years 1881, 1882 and 1883 were duly paid; that the said pretended tax deed referred to in the said answer of said defendants was never recorded, as provided by law; that the description of the said premises claimed by defendants under said pretended tax deed, never appeared in the index to the record of said deed; that no notice, by record or otherwise, was ever given of any claim against said premises by virtue of any tax sale whatever.

Wherefore plaintiff prays recovery, as in his complaint set forth.

W. Scott Beebe and
John C. Stallcup,
Attorneys for Plaintiff.

State of Washington, } *ss.*
County of Pierce. }

John C. Stallcup, on his oath says: That he is one of the attorneys for the said plaintiff in the said action, duly authorized in the premises; that the said plaintiff is a non-resident of the State of Washington, and is now absent from said state. That he has read over the foregoing reply of the said plaintiff; that the same is true according to his best knowledge and belief.

John C. Stallcup.

Sworn to and subscribed by said John C. Stallcup before me, this 15th day of February, A. D. 1892.

Edward Phillips.
[*Seal.*] *Notary Public for the State of Washington, residing at Tacoma, Pierce county.*

Received copy of the foregoing reply this 15th day of February, 1892.

.....
Attorneys for Defendants.

ENDORSEMENT.

No ..... Law. F. V. McDonald *vs.* Dolphus B. Hannah *et al.* Reply. W. Scott Beebe and John C. Stallcup, for plaintiffs. Filed February 15, 1892. A. Reeves Ayers, clerk.

And, afterwards, to-wit: On the 18th day of February, 1892, there was duly filed in said court, in said cause, a stipulation waiving a jury in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. McDONALD,
Plaintiff,
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH,
Defendants.

STIPULATION.

It is hereby stipulated between the parties to this action by their respective attorneys, that a trial hereof by a jury is hereby waived, and that the case shall be tried by the court and without the intervention of a jury.

W. SCOTT BEEBE,
J. C. STALLCUP,
Attorneys for Plaintiff.

JUDSON & SHARPSTEIN,
Attorneys for Defendant.

ENDORSEMENT.

McDonald *vs.* Hannah. Stipulation to waive jury. Filed February 18, 1892. A. Reeves Ayres, clerk.

And, afterwards, to-wit: On the 18th day of February, 1892, there was duly filed in said court, in said cause, a stipulation in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Washington.

F. V. McDonald, *Plaintiff*,
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants*.

Stipulation.

It is agreed that defendants have leave to file their amended answer in this case, that plaintiff file his replication thereto at any time before the day set for trial.

That the abstract of title ordered and furnished in the case of F. V. McDonald *vs.* John Donaldson *et al* pending in this court may be referred to as evidence in this case, in so far as it shows conveyances affecting the title to the land described in plaintiff's complaint herein, and that either party may have privilege of filing in evidence a certified copy from the records of any instrument referred to in said abstract that may be deemed as material evidence upon the trial of this case; that the abstract reference thereto may be used upon the trial in lieu of the instrument for convenience. It being understood that the party using said abstract shall specify such instruments contained therein as he may designate as his chain of title, and that the instruments so designated, and no others, shall be considered by the court, subject to such objections to their introduction as might be made in case the original instruments, or certified copies thereof, had been first offered, and that the said entries in said abstract shall be replaced by certified copies as soon as practicable. This stipulation and arrangement is made for convenience only.

John C. Stallcup,
Judson & Sharpstein,
Attorneys for Defendants.

ENDORSENENT.

F. V. McDonald *vs.* Hannah. Stipulation. Filed February 18, 1892. A. Reeves Ayers, clerk.

And, afterwards, to-wit: On Thursday, the 18th day of February, 1892, the same being the fourteenth judicial day of the regular February term of said court,

present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to-wit:

F. V. McDonald,
Plaintiff,
vs.
D. B. Hannah and Kate E. Hannah,
Defendants.

Now, on this day, this cause came on for hearing and the same was argued by counsel till the hour of adjournment.

And, afterwards, to-wit: On Friday, the 19th day of February, 1892, the same being the fifteenth judicial day of the regular February term of said court; present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to-wit:

F. V. McDonald,
Plaintiff,
vs.
D. B. Hannah and Kate E. Hannah,
Defendants.

Now, on this day, this cause again coming on to be heard, the same proceeded by hearing the arguments of counsel, and the cause was thereupon taken under advisement by the court.

And, afterwards, to-wit: On the 22d day of June, 1892, there was duly filed in said court, in said cause, the opinion of the court in the words and figures as follows, to-wit:

United States Circuit Court, District of Washington.—Western Division.

F. V. McDonald,
vs.
D. B. Hannah and Wife.

At law: action to recover possession of real estate; jury waived; findings and judgment for the defendants.

W. Scott Beebe and
J. C. Stallcup,
For Plaintiff.
Judson & Sharpstein,
For Defendants.

Hanford, J.— The plaintiff claims title by virtue of a quit-claim deed to him from one Mary A. Givens. The defendants entered and were in actual possession of the demanded premises for a period of more than four years before the commencement of the action, claiming title thereto by virtue of a tax deed executed by the sheriff of Pierce county, pursuant to a sale of the property for delinquent taxes assessed against the plaintiff's grantor, Mary A. Givens. In their answer the defendants deny that the plaintiff has any title or right to the possession of the property, therefore, before any question affecting their rights can, with propriety, be considered, the plaintiff must prove his title, for, unless he can show a *prima facie* right of possession, it is mere impertinence on his part to question the rightfulness of the defendants' actual possession. The evidence does not show that the title to the property was ever vested in Mary A. Givens, but inasmuch as in their answer the defendants claim title to the property under a conveyance pursuant to a sale for delinquent taxes of said Mary A. Givens, it is urged in behalf of the plaintiff that the parties claim title from a common source; that the defendants cannot, without utterly destroying their own claim, successfully impeach the title of the plaintiff's grantor, and that proof of her title is, therefore, unnecessary.

Where the revenue laws of a state provide for the taxation of land and proceedings *in rem* against the property assessed for the collection of the tax levied upon it, without imposing any personal liability upon the owner, the purchaser at a tax sale acquires an original and independent title created by law, but the system of taxation provided by the laws of Washington territory, under which the defendant's tax deed was executed, is quite different. Said laws require the listing of property for taxation upon an assessment role in a prescribed form containing the names of all known owners of property, real and personal, and provide that lands must be assessed in the names of the owners, if known; taxes when levied constitute a debt due from the owner, and the same may be collected by distraint, and lands are not subject to sale for delinquent taxes, except in the event of failure on the part of the owner to pay the tax, and of the tax collector to find personal property of the owner sufficient to produce the amount due. Under such

a system the title conveyed by a tax deed is derivative as in the case of a sale under judicial process. The revenue officers making the sale and tax deed are clothed with legal authority to convey the title of the delinquent owner, and only such title as he has passed to the grantee by the tax deed. Black on Tax Titles, sections 232-233. While I agree with counsel for the plaintiff as to the abstract legal proposition, it is impossible for me to give them the benefit of it in this case, as I would do if there were no evidence in the case in regard to Mary A. Givens' title. The parties have introduced an abstract of the record, showing the facts in regard to her claim of title, by which it affirmatively appears that no title was ever vested in her. This evidence is in the case, and in the light thereof the court cannot blindly presume, contrary to the facts, that she has made a valid conveyance of title to the premises, there being no basis for such presumption, other than a mere rule of practice, under which, for convenience, if the parties had seen fit to rely upon it, proof of her title might have been dispensed with. The land in controversy is part of the tract involved in the case of F. V. McDonald *vs.* John Donaldson, *et al.*, recently determined in this court. 47 Fed. Rep. 765. The husband of Mary A. Givens, with other persons, acquired the title to said tract as tenants in common, and by transactions between themselves, and a succession of untoward occurrences, as shown by the published statement and opinion of the court in that case, the title became snarled, one of the most serious complications being caused by the death of Givens, which occurred in the year 1873. Being non-residents, the statutes of the territory in relation to the property rights of married persons, enacted prior to his death, were inapplicable to Mr. and Mrs. Givens, and conferred no rights upon the widow; neither was she, by the laws then in force, entitled to take any part of her husband's real estate by inheritance. The partition deed made to her by Matthews as attorney in fact, was void, for the reason that, by the death of her husband, the power of attorney under which Matthews acted was annulled. She had a right of dower and nothing more; but the demanded premises have not been awarded to her in any proceeding, according to the statute for assignment of dower, therefore, her grantees acquired no title or right of possession by the deed from her, even if the execution, delivery and validity thereof be assured.

The record in the partition suit of McDonald *vs.* Donaldson, *et al.* above referred to, was offered in evidence and the same is now relied upon by the plaintiff who claims that by the judicial determination of this court his title to the premises has been established. The defendants objected to the introduction of this record, claiming that the same is incompetent and immaterial, for the reason that as they were not parties to the suit they cannot be bound by the determination. The decree is equivalent to a quit-claim deed to the plaintiff from all the other parties to the partition suit of their respective interests in the demanded premises, and is, therefore, a connecting link in the chain of title, and is competent evidence for the plaintiff, just as conveyances of title from the respective owners of undivided interests made without knowledge of, or privity with the defendants, would be competent. I, therefore, overrule the defendants' said objection. The defendants are not, however, concluded by said decree, nor can they be denied their day in court to put in issue the validity of plaintiff's pretended right to the demanded premises, and subject the same to the test of a judicial determination.

Neither the defendants, nor the heirs, or legal representatives of Givens were in court as parties to the partition suit, and by the course pursued by those who were parties, the court was precluded from investigating or deciding the questions affecting the plaintiff's pretended title now in issue. In view of these facts, the court could not, by its decree, create a new and original title, nor divest the true owner of his title to the premises and against the parties in actual possession, the decree affords no ground for a judgment of ouster.

I have, after mature reflection, determined to rest my decision upon the actual rights of the parties as they appear, rather than upon ground involving only mere questions of practice or technicalities. The deeds and documentory evidence introduced by the respective parties were all objected to, and were all, at the time of being offered, received subject to the objections so made. I now overrule all of said objections and admit all of said deeds, papers and documents, except the original records of the City of Tacoma. Extracts from said originals, containing all that is material, made under my direction, will be received and filed in the case in place of said original records.

My opinion upon other questions debated by counsel would not be determinative of the rights of the parties, and could not be regarded as anything more than *obiter dicta* and, therefore, not of sufficient value to justify a further extension of this opinion.

Findings of fact may be prepared and a judgment will be entered in accordance with this opinion.

C. H. HANFORD, *Judge.*

ENDORSEMENT.

No. 113. In the United States Circuit Court, District of Washington, Western Division. F. V. McDonald, plaintiff, *vs.* D. B. Hannah, *et ux.*, defendants. Opinion. Filed June 22, 1892. A. Reeves Ayres, clerk. Beebe and Stallcup, attorneys for plaintiffs.

And, afterwards, to-wit: On the 23d day of June, 1892, there was duly filed in said court, in said cause, a motion for a new trial in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. McDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH. *Defendants.*
Motion for a New Trial.

Now comes the plaintiff and moves the court for a new trial of the said case for these:

I.

Insufficiency of the evidence to justify the decision of the court upon the facts.

II.

Insufficiency of the evidence to justify the decision of the court upon the law.

III.

The decision of the court that plaintiff was without title to the demanded premises is against the law.

For that the deed by Matthews to plaintiff's immediate grantor, Mary A. Givens, under the power of attorney of her husband, vested her with the title to the demanded premises previously held by her husband, James H. Givens, and others.

For that the decree of partition vested plaintiff with all the title in the demanded premises theretofore held by the other parties thereto.

And for that plaintiff's said immediate grantor was the common source of title to the demanded premises.

This motion is made upon the evidence shown by the stenographer's extended notes and the documentary evidence adduced upon the trial of the case, together with the pleadings and proceedings in the case.

W. Scott Beebe and
John C. Stallcup,
Attorneys for Plaintiff.

Received a copy hereof this 23d day of June, A. D. 1892.

.....
Attorneys for Defendants.

ENDORSEMENT.

F. V. McDonald *vs.* Dolphus Hannah *et ux.* Motion for new trial. Filed June 23d, 1892. A. Reeves Ayers, clerk. W. S. Beebe and John C. Stallcup, for plaintiff.

And, afterwards, to-wit: On Thursday, the 7th day of July, 1892, the same being the third judicial day of the regular July term of said court, present the Honorable

Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to-wit :

F. V. McDonald, *Plaintiff*,
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants*.
No. 113.

Now, on this 7th day of July, 1892, after the entry of judgment herein, the court being duly advised in the premises, denies plaintiff's motion for new trial heretofore made and filed.

C. H. Hanford, *Judge*.

ENDORSEMENT.

F. V. McDonald *vs.* D. B. Hannah *et ux*. Order on motion for a new trial. Filed July 7, 1892. A. Reeves Ayers, clerk. R. B. L. 20.

And, afterwards, to-wit : On Thursday, the 7th day of July, 1892, the same being the third judicial day of the regular July term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to-wit :

In the Circuit Court of the United States ; Ninth Judicial Circuit ; District of Washington.—Western Division.

F. V. McDonald, *Plaintiff*,
vs.
Dolphus H. Hannah and Kate E. Hannah, *Defendants*.
No. 113.

This cause came regularly on for trial on the 18th day of February, A. D. 1892, before the court sitting without a jury, trial by jury having been waived by the respective parties by stipulation on file in the cause.

Plaintiff appeared by his attorneys, W. Scott Beebe and J. C. Stallcup, Esqs., and the defendants by their attorneys, Messrs. Judson & Sharpstein. And,

The plaintiff, to prove his case, introduced oral and documentary testimony, and rested, and thereupon defendants introduced oral and documentary proof and rested, and upon the conclusion of defendants' case, plaintiff introduced oral and documentary proof in rebuttal and rested; and thereupon, and on the 19th day of February, 1892, said cause was argued and submitted to the court for its decision.

And, now, on this 7th day of July, A. D. 1892, the court being fully advised in the premises, files this, its

FINDINGS OF FACT:

First: That plaintiff is a citizen of the State of California, and the defendants are citizens of the State of Washington.

Second: That the plaintiff is not the owner in fee of, nor has he a right to, nor is he entitled to the possession of the real property, situate in the City of Tacoma, County of Pierce and State of Washington, and described as follows, to-wit:

Commencing fifty-three and one-third chains north, and six chains east of the southwest corner of section five, in township twenty, north of range three, east of the Willamette meridian; thence running east six chains; thence south six and two-thirds chains; thence west six chains; thence north six and two-thirds chains to the place of beginning.

Third: That the defendants are in the actual possession of said premises, and have been so in the possession of the same for a period of four years immediately preceding the commencement of this action, but that they do not wrongfully withhold the same from plaintiff.

Fourth: That the property, described herein, exceeds the sum of five thousand dollars, to-wit: The sum of twenty thousand dollars.

And, from the foregoing findings of fact, the court finds, as

CONCLUSIONS OF LAW :

That judgment should be entered herein, dismissing plaintiff's action.

WHEREFORE, by reason of the law and the premises,

IT IS ORDERED, ADJUDGED AND CONSIDERED : That plaintiff's action be, and the same is hereby dismissed ; and that the defendants do have and recover of plaintiff the costs and disbursements of this action, to be taxed by the clerk.

C. H. HANFORD, *Judge of said Court.*

ENDORSEMENT.

No. 113. In the United States Circuit Court, District of Washington, Western Division. F. V. McDonald, plaintiff, *vs.* D. B. Hannah, *et al.*, defendants. Findings of fact and judgment. Filed July 7th, 1892. A. Reeves Ayers, clerk. W. C. Sharpstein, attorney for defendant. Office, room No. — Bank Republic building, Tacoma. Judgment book, pages seventeen and eighteen.

And, afterwards, to-wit : On Friday, the 9th day of September, 1892, the same being the thirteenth judicial day of the regular July term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to-wit :

F. V. McDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH, *Defendants.*

Now, on this day, counsel for the plaintiff in open court presents his bill of exceptions in this cause, and the same is allowed and signed.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington.—Western Division.

F. V. McDonald, *Plaintiff,*
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants.*

Bill of Exceptions.

Be it remembered: That the above entitled cause came on for trial regularly in the above entitled court, on February 19, 1892. Plaintiff and defendants, by their respective attorneys, duly stipulated in writing that said case should be tried by the court without the intervention of a jury.

I.

Thereupon the plaintiff, to maintain the issue upon his part, offered in evidence a certified copy of a deed from Mary A. Givens to the plaintiff.

To which offer defendants objected.

First: Upon the ground that the same is incompetent an immaterial, because it was not the best evidence.

Second: Because there is no proof that the grantor ever had possession of the premises described therein, or any part thereof.

Third: Because no title is shown in the grantor to the premises described therein, or to any part thereof.

Which objections the court severally overruled, and ordered the said paper to be admitted in evidence and marked "Exhibit A."

To which order and ruling of the court the defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon the said deed was read in evidence, and a copy of the same is hereto attached, marked "Exhibit A," and made a part of this bill.

II.

Plaintiff thereupon offered the original deed from Mary A. Givens to plaintiff.

To which offer defendants objected.

First: Upon the ground that the same is incompetent because no proof has been made of its execution.

Second: There is no proof that the grantor ever had possession of the premises described therein, or any part thereof.

Third: That no title is shown in the grantor to the premises described therein, or to any part thereof.

Fourth: That the paper offered bears evidence of material alterations having been made, and no competent proof being offered to show that the same were made before execution.

Fifth: The instrument is not acknowledged as required by law to entitle it to be recorded as a conveyance of real estate.

Sixth: It does not appear that it was ever filed for record or recorded in the office of the auditor of Pierce county, the county in which the premises are situated.

Which objections the court severally overruled, and ordered the said paper to be admitted in evidence and marked "Exhibit B."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon the said deed was read in evidence, and a copy of the same is hereto attached, marked "Exhibit B," and made a part of this bill.

III.

Plaintiff then offered in evidence a certified copy of a decree of the Circuit Court of the United States, for the District of Washington, in the case of F. V. McDonald *vs.* John Donaldson *et al.*, the same being a decree in partition.

To which offer defendants objected.

First: Upon the ground that the same is incompetent, it being a decree rendered in a suit to which neither of the defendants herein were parties.

Second: Because no title has been shown in any of the persons recited in said decree, to be owners of any interest in the premises involved in this action.

Which objections the court severally overruled, and ordered the said paper to be admitted in evidence and marked "Exhibit C."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon the said decree was read in evidence, and a copy of the same is hereto attached, marked "Exhibit C," and made a part of this bill.

IV.

Plaintiff then offered in evidence defendant's original answer filed in this cause.

To which offer defendants objected, upon the ground that the same is incompetent, the same having been superseded by an amended pleading.

Which objection the court overruled and ordered said paper to be admitted in evidence and marked "Exhibit D."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said objection was allowed.

Thereupon the said answer was read in evidence, and a copy of the same is hereto attached, marked "Exhibit D," and made a part of this bill.

V.

Plaintiff then offered in evidence defendant's first amended answer, filed in this cause.

Which said amended answer was, without objection, admitted and read in evidence, and a copy of the same is hereto attached, marked "Exhibit E," and made a part of this bill.

VI.

The plaintiff then called George P. Riley, who, having been first duly sworn, testified as follows:

I reside in Tacoma; I knew James H. Givens in his life time; also knew Mary A. Givens; they were husband and wife; James H. Givens died in 1872; they had no children to my knowledge; Mrs. Givens is still unmarried; I know the property in dispute, and have an approximate idea of its value; the estimated value of the land in dispute is worth, exclusive of the improvements, ten thousand dollars per acre.

And on cross-examination the witness testified as follows:

James H. Givens and Mary A. Givens, resided in Portland, Oregon, until Mr. Givens' death; they never resided in Washington territory; they were married before coming to Portland; they came from New Bedford, Massachusetts, to Portland.

VII.

The plaintiff's attorneys then stated to the court that, although they did not regard it as necessary, they would offer a certified copy of a patent from the United States to Thomas Hood.

Which said patent was, without objection, admitted and read in evidence, and a copy thereof is hereto attached, marked "Exhibit F," and made a part of this bill.

VIII.

Plaintiff then offered in evidence a certified copy of a deed from Thomas Hood to C. P. Ferry and L. C. Fuller.

To which offer defendants objected that the same was incompetent, purporting to have been acknowledged before a person not authorized under the laws of Washington to take acknowledgments of deeds, and therefore not entitled to record.

Which objection the court overruled and ordered said paper to be admitted in evidence and marked "Exhibit G."

To which order and ruling of the court, defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon the said deed was read in evidence, and a copy of the same is hereto attached, marked " Exhibit G," and made a part of this bill.

IX.

Plaintiff then offered a certified copy of a deed from C. P. Ferry and L. C. Fuller, and their respective wives, to E. M. Burton.

To which offer defendants objected that the same was incompetent and immaterial, no possession or title having been shown in the grantors, or either of them.

Which objection the court overruled and ordered said paper to be admitted in evidence and marked "Exhibit H."

To which order and ruling of the court, defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon the said deed was read in evidence, and a copy thereof is hereto attached, marked " Exhibit H," and made a part of this bill.

X.

Plaintiff then offered a certified copy of a deed from E. M. Burton *et ux.*, to L. C. Fuller and C. P. Ferry.

To which offer defendants objected that the same was incompetent and immaterial, no possession or title having been shown in the grantor.

Which objection was, by the court, overruled and said paper was ordered to be admitted in evidence, and marked "Exhibit I."

To which order and ruling of the court, defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon said deed was read in evidence, and a copy thereof is hereto attached, marked " Exhibit I," and made a part of this bill.

XI.

Plaintiff then offered in evidence a certified copy of a deed from L. C. Fuller and C. P. Ferry, and their respective wives, to the Working Men's Joint Stock Association, a corporation organized under the laws of Oregon.

To which offer defendants objected that the same is incompetent and immaterial, no possession or title having been shown in the grantors, or in either of them.

Which objection the court overruled and ordered said paper to be admitted in evidence, and marked "Exhibit J."

To which ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon said deed was read in evidence, and a copy thereof is hereto attached, marked "Exhibit J," and made a part of this bill.

XII.

Plaintiff then offered in evidence a certified copy of a deed from L. C. Fuller, C. P. Ferry and their respective wives, and the Working Men's Joint Stock Association, to George P. Riley and others.

To which offer defendants objected that the same is incompetent and immaterial, no possession or title having been shown in the grantors, or in either of them, and,

Further, because the paper purports to have been acknowledged before a person not authorized by the laws of Washington to take acknowledgments of deeds, and, therefore, the paper is not entitled to record.

Which objection the court overruled and ordered said paper to be admitted in evidence, and marked " Exhibit K."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon said deed was read in evidence, and a copy thereof is hereto attached, marked "Exhibit K," and made a part of this bill.

XIII.

Plaintiff then offered a certified copy of a power of attorney from George P. Riley, *et al.*, to John W. Matthews.

To which offer defendants objected that the same is immaterial and incompetent.

First: It appearing not to have been executed by Edward Simmons, George Thomas and Annie Rodney, nor by any one for them whose authority has been shown.

Second: Because the same is not acknowledged by all of the parties described as principals, nor by anyone for them whose authority has been shown.

Third: Because said instrument is not acknowledged as required by the laws of Washington so as to entitle it to record. Which objections the court severally overruled, and ordered that said paper be admitted in evidence, and marked "Exhibit L."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon said deed was read in evidence, and a copy thereof is hereto attached, marked "Exhibit L," and made a part of this bill.

XIV.

Plaintiff then offered a certified copy of a deed from George P. Riley and others, by John W. Matthews as attorney-in-fact, to Mary H. Givens.

To which offer the defendants objected that the same is incompetent.

First: Because it purports to be a deed executed by a person describing himself to be an attorney-in-fact, and no power or authority from the persons for whom he professes to act has been shown.

Second: That the only power attempted to be shown appears to have been given by fourteen persons, and the evidence shows that one of them, to-wit: James H. Givens, was dead at the time of the execution of the instrument offered, and that the power under which said attorney professes to act was joint.

Third: And, further, that no possession or title is shown in the parties named as principals, or in any of them, to the premises described and involved in this action, or to any part thereof.

Which objections were severally overruled by the court, and said paper ordered admitted in evidence, and marked "Exhibit M."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

Thereupon, said deed was read in evidence, and a copy thereof is hereto attached, marked "Exhibit M," and made a part of this bill.

XV.

And, thereupon, plaintiff rested his case, and the defendants, to maintain their defense, offered a certified copy of an instrument, purporting to be a deed from the Territory of Washington to William B. Kelly, of the premises described in the complaint.

To which offer plaintiff objected that the same is incompetent, irrelevant and immaterial.

First: Because it purported to be a deed for land sold for taxes and said deed was not made in the name, and did not run in the name of the Territory of Washington, and notice of expiration of time for redemption was not given before execution of deed.

Second: Because, in the granting clause thereof, it purports to be the deed of Lewis Byrd, sheriff, and not the Territory of Washington.

Third: Because it purports to be a deed made pursuant to a sale of land for territorial and county taxes instead of for city taxes.

Fourth: Because the deed is void upon its face because it does not appear therefrom that there was ever any assessment of the property described therein.

Fifth: And for the further reason that the defendants cannot, under their answer in this case, show any title in themselves.

Which objections the court severally overruled and ordered that said paper be admitted in evidence, and marked "Exhibit N."

To which order and ruling of the court, plaintiff, by his attorneys, did then and there duly except, which exception was allowed.

Thereupon said paper was read in evidence, and a copy thereof is hereto attached, marked "Exhibit N," and made a part of this bill.

XVI.

Defendants then offered and read in evidence, without objection, a deed from W. B. Kelly and wife to Dolphus B. Hannah; a copy of which is hereto attached, marked "Exhibit O," and made a part of this bill.

XVII.

Defendants then introduced and read in evidence, without objection, Ordinances Nos. 58 and 90, of the City of New Tacoma, which are attached hereto, marked respectively, "Exhibits P" and "Q," and made a part of this bill.

XVIII.

Defendants next called in their behalf John P. Judson, who, being first duly sworn, testified as follows:

I am one of the attorneys for the defendants in this case; I know the paper shown me, the original answer of the defendants in this cause; it was drawn by me; the paragraph in said answer called to my attention, numbered third in the further answer and defense, wherein defendants stated that one Mary A. Givens, was the record owner and also the owner in fact of said premises, was not

inserted for the purpose of admitting the title of said Mary A. Givens, but was inserted upon the theory that I had that in order to show a good tax title, it was necessary to allege that the property was assessed either to the owner, or to unknown owners, where the owner was not known; I explained to Mr. Hannah, one of the defendants, what the answer was in general terms, that we had denied the fact that plaintiff was the owner of the property, and had then set up the tax title and proceedings under which the deed was made.

To all of which testimony the plaintiff objected that the same was incompetent, irrelevant and immaterial.

Which objection was, by court, overruled, and exception taken by the plaintiff, and said exception allowed.

XIX.

And, thereupon, D. B. Hannah, one of the defendants in this case, was called in his own behalf, and being duly sworn, testified as follows:

I recognize the paper shown me as the original answer in this case; I signed it and verified it; Mr. Judson handed it to me and stated that I might read it if I liked, but that it was simply an answer denying the title of plaintiff and setting up my title under the tax deed; I told him there was no need of my reading it over because he had made it, and I would sign it; I have always insisted that Mary A. Givens had no title to this property, and certainly had no intention in signing that answer of admitting that either she or the plaintiff was the owner of the property; I am one of the defendants in this action; Kate E. Hannah is my wife; I am the same Dolphus B. Hannah as is named as grantee in "Exhibit O;" I entered into possession of the land described therein, under said deed, "Exhibit O," 1886; in that year I cleared the land; took out the stumps and roots, and the brush and logs at a cost of $400; in the fall of 1887, I built a substantial board fence around it, and kept the gate locked; in the spring of 1888, I rented it as a cow pasture, and it was used for that purpose until April, 1890, when I erected a dwelling house on it and made other improvements which, altogether, cost me $5,000. During the time I have held the land I have paid the taxes of the

City of Tacoma, and territorial and county taxes; since I built the dwelling house I have continuously resided there with my family. No one else has ever been in possession of that property to my knowledge; when I first knew it, it was wild land covered with standing timber, logs and some stone.

To all of which testimony the plaintiff objected that the same was incompetent, irrelevant and immaterial.

Which objection was by the court overruled, and exception taken by plaintiff, and said exception allowed.

And, thereupon, the defendants rested their case.

XX.

The plaintiff then, for the purpose of showing that the land in controversy was not assessed, nor advertised, nor sold for taxes, as recited in said tax-deed, called one Edward N. Fuller, who, being first duly sworn, testified as follows:

In 1883 I was editor of a paper known as *The Daily News* in the City of Tacoma; I was editor from August, 1882; the delinquent tax lists were not published in my paper; during those years 1882 and 1883 there was only one other paper in the city, that was the *Daily* and *Weekly Ledger;* the publication of the *Daily Ledger* commenced in April, 1883, and the publication of the *Daily News* was commenced in September, 1883; each of said papers had a weekly publication preceding the publication of the dailies, and were the only weekly papers published in the city at that time, and that the notice of sale of lands for delinquent taxes for the year 1882 was published in the *Ledger* of April 20 and 27 and May 4, 1883.

Counsel for plaintiff then showed witness a paper of the date of April 20, 1883; also one of April 27, 1883, and another of May 4, 1883, and the witness thereupon stated:

The papers handed me are *Weekly Ledgers*, published in New Tacoma, on the dates of April 20 and 27, and May 4, 1883.

And, thereupon, counsel for plaintiff offered the said papers in evidence, for the purpose of showing that the

premises involved in this action had not been advertised therein for sale for delinquent taxes, there being no property in said advertisement described at all like the property herein involved, other than that shown in "Exhibit R," hereinafter referred to.

To which offer defendants objected, on the ground that the same were incompetent, irrelevant and immaterial; that no testimony is admissible to show whether or not any notice was published, the Code of Washington, under which the tax deed in this case was executed, making said deed conclusive evidence that said notice was published. And,

Further, that more than three years have elapsed since the recording of said deed, and more than three years have elapsed since possession was taken by the defendants of said premises, and the plaintiff in this action and all persons under whom he claims are concluded by said deed and precluded from offering any testimony to impeach said deed.

Which objections were severally overruled by the court, and the papers were ordered admitted and read in evidence, and marked "Exhibit R." To which order and ruling of the court, defendants, by their counsel, did then and there duly except, and said exception was allowed. And that part of the said advertisement in said papers, showing the heading and showing the description therein of the property, is as shown by "Exhibit R," hereto attached and made a part of this bill of exceptions.

XXI.

And, for the purpose mentioned in the last offer, the plaintiff offered the official assessment roll of New Tacoma, Washington territory, for the year 1882, and particularly that portion of said roll on page 24 thereof, which refers to the property assessed in the name of Mary A. Givens.

To which offer defendants objected, that the same is incompetent, irrelevant and immaterial, because the tax deed involved in this action had been filed for record more than three years preceding the commencement of this action, and possession of the premises described therein

had been taken and held for more than three years next preceding the commencement of this action, and the plaintiff was thereby concluded from impeaching said deed.

Which objection was by the court overruled, and the court ordered that a copy of said page 24 be made and admitted in evidence for all intents and purposes and with like effect as the original, and the same was read in evidence and marked "Exhibit S."

To which order and ruling of the court, defendants, by their counsel, did then and there duly except, and said exception was allowed.

XXII.

Plaintiff then offered in evidence the official duplicate assessment roll of New Tacoma, Washington territory, for the year 1882, and particularly that portion of page 26 thereof referring to an assessment in the name of Mary A. Givens.

To which offer defendants objected that the same is incompetent, irrelevant and immaterial, because the tax deed involved in this action had been filed for record more than three years preceding the commencement of this action, and possession of the premises described therein had been taken and held for more than three years next preceding the commencement of this action, and the plaintiff was thereby concluded from impeaching said deed.

The interlineation SW being in different ink from the others.

Which objection was by the court overruled, and the court ordered that a copy of said page 26 be made and admitted in evidence for all intents and purposes, with like effect as the original; and the same was read in evidence and marked "Exhibit T."

To which order and ruling of the court defendants, by their counsel, did then and there duly except, and said exception was allowed.

XXIII.

And, thereupon, plaintiff rested his case. And at the conclusion of taking testimony, and the introduction of paper writings, it was stipulated by counsel, and the court ordered that copies be made thereafter of all papers that

had been offered in original form, with the exception of the original deed, "Exhibit B," and that the copies so made should be used with like effect as the originals and that said originals should remain in the care of the lawful custodians thereof.

This bill of exceptions contains all of the testimony introduced by the plaintiff in support of, or to establish his case, and also all of the testimony introduced on the part of the defendants, or either of them. That afterwards, and on June 22, 1892, rendered a decision to the effect that plaintiff had failed to establish title in himself, and that thereafter a motion for a new trial was filed, which the court denied.

This bill of exceptions, therefore, is examined and allowed within the time allowed by the court for presenting the same.

"EXHIBIT A."

State of Washington, } *ss.*
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office at 9:20 o'clock A. M., on the 21st day of January, 1889, and is recorded on pages 244 and 245, vol. 38 of records of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this eighth day of February, 1892.

W. H. HOLLIS,
Auditor Pierce County, Wash.
A. A. SWOPE,
Deputy.

QUITCLAIM DEED.

Know all Men by These Presents, That I, Mary A. Givens, widow of James H. Givens, of New Bedford, Massachusetts, in consideration of fifteen hundred dollars to me paid by Frank V. McDonald, of San Francisco, State of California, do hereby remise, release and forever quitclaim unto Frank

V. McDonald, his heirs and assigns, all the following bounded and described real property, situated in the Territory of Washington :

The southwest quarter of the northwest quarter, and the west half of the southeast quarter of the northwest quarter of section five, in township twenty, north of range three east, in Pierce county, Washington territory.

Also section six, in township twenty, north of range three east, in Pierce county, Washington territory.

Also that piece of land described as commencing at a stake forty rods north of the south line and one hundred and sixty rods from the southwest corner of E. Hanford's donation land claim, and running thence north forty rods ; thence east eighty rods ; thence south forty rods ; thence west eighty rods to place of beginning, situated in section eight and nine in township twenty-four, north of range four east, in King county, Washington territory.

Together, with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all my estate, right, title and interest in and to the same.

To have and to hold the above described and granted premises unto the said Frank V. McDonald, his heirs and assigns forever.

And I, Mary A. Givens, the grantor above named, do covenant to and with Frank V. McDonald, the above named grantee, his heirs and assigns, that the above granted premises are free from all encumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever claiming by, through or under me, but against none others.

In witness whereof, I, the grantor above named, hereunto set my hand and seal this 17th day of October, A. D. 1888.

Her
Mary A. x Givens, [*Seal.*]
Mark.

Signed, sealed and delivered in presence of

Frank A. Milliken,
Emanuel Sullavon.

State of Massachusetts, }
County of Bristol. } *ss.*

Be it remembered, That on this 17th day of October, A. D. 1888, before me, the undersigned, a notary public in and for said county and state, personally appeared the within, Mary A. Givens, of New Bedford, in said county, widow of James H. Givens, who is known to me to be the identical person described in, and who executed the within instrument, and acknowledged to me that she executed the same. And I hereby certify that the alterations making this instrument a quitclaim deed, and Frank V. McDonald, grantee therein, instead of Samuel Coulter, were made before signing and executing the same.

In testimony whereof, I have hereunto set my hand and notarial seal, the day and year last above written.

FRANK A. MILLIKEN,

[*Notarial Seal.*] *Notary Public.*

State of Massachusetts, }
County of Bristol. } *ss.*

I, Thomas J. Cobb, clerk of the Third District Court of Bristol, in and for said county (said court being a court of record), do hereby certify that Frank A. Milliken, of New Bedford, in said county, whose name is subscribed to the certificate of proof, or acknowledgment of annexed instrument, and thereon written was, at the time of taking of such proof or acknowledgment, a notary public of the State of Massachusetts, in and for the said County of Bristol, dwelling in said county, commissioned and sworn, and duly authorized to take the same.

And, further, that I am well acquainted with the hand writing of such notary public, and verily believe that the signature to the said certificate is genuine, and that said instrument is executed and acknowledged according to the laws of the State of Massachusetts.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of October, 1888.

[*Clerk's Seal.*] THOMAS J. COBB, *Clerk.*

"Exhibt B."

QUITCLAIM DEED. ~~WARRANTY DEED.~~

Know all Men by These Presents, That I, Mary A. Givens, of New Bedford, ~~County of~~ Massachusetts, ~~State of Oregon~~ in consideration of fifteen hundred dollars, ~~Dollars~~ to me paid by ~~Samuel Coulter~~ Frank V. McDonald, of ~~Portland~~ San Francisco, ~~County of Multnomah~~, State of California do hereby remise, release and forever quitclaim ~~Oregon, have bargained and sold and by the presents do grant, bargain, sell and convey~~ unto said Frank V. McDonald, ~~Samuel Coulter~~ his heirs and assigns, all the following bounded and described real property situated in the county of Territory of Washington and State of Oregon :

The southwest quarter of the northwest quarter and the west half of the southeast quarter of the northwest quarter of section five, in township twenty, north of range three east, in Pierce county, Washington territory.

Also, section six, in township twenty, north of range three east, in Pierce county, Washington territory.

Also, that piece of land described as commencing at a stake forty rods north of the south line, and one hundred and sixty rods from the southwest corner of E. Hanford's donation land claim, and running thence north forty rods, thence east eighty rods, thence south forty rods, thence west eighty rods to the place of beginning, situated in sections eight and nine, in township twenty-four north of range four east, in King county, Washington territory.

Together, with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and also all my estate, right, title and interest in and to the same, including dower and claim of dower.

To have and to hold the above described and granted premises unto the said Frank V. McDonald, his heirs and assigns forever. And I, Mary A. Givens, the grantor above named, do covenant to and with Frank V. McDonald, the above named grantee, his heirs and assigns, that the above granted premises are free from all encumbrances made or suffered by me, and that I will and my heirs, executors and administrators shall warrant and forever

defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever claiming by, through or under me, but against none other.

In witness whereof, I, the grantor above named, hereunto set my hand and seal this 17th day of October, A. D. 1888.

Her
MARY A. x GIVENS.
Mark.

Signed, sealed and delivered in presence of
FRANK A. MILLIKEN,
EMANUEL SULLAVON.

State of Massachusetts, } ss.
County of Bristol. }

Be it remembered, that on this 17th day of October, A. D. 1888, before me, the undersigned, a notary public in and for the said county and state, personally appeared the within named Mary A. Givens, of New Bedford, in said county, widow of James H. Givens, who is known to me to be the identical person described herein, and who executed the within instrument and acknowledged to me that she executed the same. And I hereby certify that the alterations making this instrument a quitclaim deed and Frank V. McDonald grantee therein, instead of Samuel Coulter, were made before signing and executing the same.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year last above mentioned.

FRANK A. MILLIKEN, *Notary Public.*

State of Massachusetts, } ss.
County of Bristol. }

I, Thomas J. Cobb, clerk of the Third District Court of Bristol, in and for said county (said court being a court of record) do hereby certify that Frank A. Milliken, of New Bedford, in said county, whose name is subscribed the certificate of proof or acknowledgment of the annexed instrument and therein written was, at the time of taking such proof or acknowedgment, a notary public of the State of Massachusetts, in and for the said County of Bristol, dwelling

in said county, commissioned and sworn and duly authorized to take the same. And, further, that I am well acquainted with the hand writing of such notary public, and verily believe that the signature to the said instrument is executed and acknowledged according to the laws of Massachusetts.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of October, 1888.

THOMAS J. COBB, *Clerk.*

"EXHIBIT C."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. McDONALD,
Complainant.
vs.
JOHN DONALDSON, JOHN HUNTINGTON, H. C. CLEMENT, ANNIE VAN OGLE, C. A. GOVE, SAMUEL COULTER, W. H. FIFE, JOHN CARSON, LOUISE M. FLOWERS, CHARLES HOWARD, D. B. HANNAH, Administrator of the Estate of GEORGE LUVINEY, deceased, D. S. MARVIN, F. S. AIKEN, H. C. BOSTWICK, WALTER N. LEE, J. B. WELSH, L. C. ARMSTRONG, B. A BISSELL, MORRIS GROSS, SHELDON ALLEN, MARY A. SMITH, E. O. FULMER, SEYMOUR R. ALLEN and MATTIE G. FULMER,
Defendants.

The above entitled suit came on to be tried in the above entitled court, on the 21st day of August, A. D. 1891, on the bill of complaint, answers, cross bills, answers to the same, replications, evidence, stipulations of counsel, exhibits, and depositions of witnesses on file therein; plaintiff appearing by W. Scott Beebe, his solicitor and defendant, Samuel Coulter appearing by Watson, Hume & Watson, his solicitors, and Annie Van Ogle and John Carson, said

defendants, appearing by Dell Stuart, their solicitor, and said defendant, H. C. Clement appearing by Fogg & Murray, his solicitor, and C. A. Gove, and John Donaldson two of said defendants, appearing by W. S. Newbury, his solicitor, and W. H. Fife and the other of said defendants appearing by Galusha Parsons, their solicitor, and Seymour Allen of said defendants, and John Plume heretofore duly made party defendant herein, appearing by their solicitor, John C. Stallcup, and the court having heard the same and the arguments of counsel, and not being fully advised, what decree ought to be entered in the premises, took the same under advisement, and now having fully considered the same, finds from the evidence, the following facts :

I.

That the plaintiff, F. V. McDonald, is a citizen and resident of the State of California, that the defendants, Samuel Coulter, C. A. Gove, Charles Howard and F. S. Aiken, are each and all, citizens and residents of the State of Oregon, and each and all of said defendants, except John Donaldson, are citizens and residents of the State of Washington, and the said John Donaldson is a subject of the Queen of Great Britain and Ireland.

II.

That on the 8th day of February, 1870, Louis C. Fuller and Clinton P. Ferry, and their respective wives, were the owners in fee-simple of the following described tract of land, situated in the County of Pierce, in the then Territory of Washington, to-wit : the southwest quarter of the northwest quarter, and the west half of the southeast quarter of the northwest quarter of section five (5), township twenty (20) north of range three (3) east of the Willamette meridian.

III.

That at, and on, and prior to said date, the Workingmen's Joint Stock Association was a private corporation, organized under the laws of the State of Oregon, having its principal office at Portland, in said state.

IV.

That on the said 8th day of February, 1870, the said Clinton P. Ferry and Annie P. Ferry, his wife, and Louis C. Fuller and Annie L. Fuller, his wife, joined in their deed, jointly executed and delivered to the said corporation, in which and by which they conveyed said tracts of land described in the second finding herein, to said corporation.

V.

That prior to, and on the 10th day of February, 1871, John Donaldson, Philip Francis, Charles Gilbert, James H. Givens, Charles Howard, John Huntington, George Washington, George Thomas, George Luviney, William Brown, Mary H. Carr, Edward S. Simmons, George P. Riley and Anna Rodney, were the stockholders, and the only stockholders of said corporation, and each was the owner and holder of 30-464 of all the capital stock of said corporation, except George Luviney, who was the owner and holder of 65-464 of said capital stock, and William Brown, who was the owner and holder of 39-464 of said capital stock.

VI.

That on said 10th day of February, 1871, a question having arisen as to the power of the said corporation to take and hold the title to said real property, it was decided by the officers and managers of the same, that the land should be conveyed to said stockholders, as tenants in common of interests therein, in proportion to the amount of the capital stock of said corporation owned and held by each, and in exchange for the same, and accordingly, the said corporation, on the 10th day of February, 1871, joined with the said Louis C. Fuller and Annie L. Fuller, his wife, and Clinton P. Ferry and Annie P. Ferry, his wife, and duly made, executed and delivered, with said persons named in the fifth finding herein, wherein and whereby they granted and quitclaimed to the said several persons, all of said real estate, to be held by them as tenants in common, in the following proportions: To said William Brown, an undivided 39-464, to said George Luviney, an undivided 65-464, and to John Donaldson, Philip Francis, Charles Gilbert, James H. Givens, Charles Howard, John

Huntington, George Washington, George Thomas, Mary H. Carr, Edward S. Simmons, George P. Riley and Anna Rodney, each an undivided 30-464.

VII.

That it is not true, as it is alleged in the cross-bill of Annie Van Ogle and John Carson, against defendant, Samuel Coulter, that one 30-464, or any other interest was issued to Charles Howard, or was issued or held in the name of Annie Rodney, in trust for him, said Charles Howard, or that he ever was the owner or holder of any other or greater interest therein, that the 30-464 subscribed by him and held by him in his own name, or that said Annie Rodney was not the owner thereof, or never had been, or never had been a subscriber for stock in said corporation, or that said Charles Howard had subscribed said stock in her name, or that said stock was never delivered to said Annie Rodney, or was delivered to said Charles Howard or held by him, or that said Annie Rodney never claimed the same nor pretended to own it in her own right.

IX.

That on the 5th day of September, 1871, an attempt was made to constitute one John W. Matthews attorney-in-fact for all the grantees in said deed, with power to sell and convey said tracts of land and other lands which the said persons owned and held in common by an instrument in writing, which was properly executed and acknowledged by John Donaldson, John Huntington, Philip Francis, Charles Gilbert, James H. Givens, Charles Howard, George Washington, George Luviney, William Brown, Mary H. Carr and George P. Riley, but was not executed or acknowledged by E. S. Simmons, George Thomas or Annie Rodney, in person. That A. S. Gross executed and acknowledged the same on behalf of E. S. Simmons and George P. Riley, signed the name of George Thomas as "proxy" and the instrument bears the name of Annie Rodney.

That on the 9th day of September, 1871, said John W. Matthews attempting and assuming to act under said instrument in writing, and under the belief by him and all of said grantees, that the same was in all respects valid and

sufficient to authorize him so to do ; the said Annie Rodney having no knowledge, except such as Charles Howard had of the same, executed to each of said stockholders, a deed signed by himself as attorney-in-fact, for all of said stockholders, a tract of land described as follows:

To Philip Francis, beginning at a point forty chains north of the southwest corner of said section six, township twenty, range three east, and running thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains ; and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To Edward S. Simmons, beginning at a point forty chains north, and six chains east of the southwest corner of said section six, and running thence east six chains, thence north $6.66\frac{2}{3}$ chains ; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To George P. Riley beginning at a point forty chains north and twelve chains east of the southwest corner of said section six, and running thence east six chains, thence north $6.66\frac{2}{3}$ chains ; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To Charles Howard, beginning at a point forty chains north and eighteen chains east of the southwest corner of section six, and running thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning ; also beginning at a point forty chains north and twenty-four chains east of the southwest corner of said section six, and running thence east six chains ; thence north $6.66\frac{2}{3}$ chains, thence west six chains ; and thence south $6.66\frac{2}{3}$ chains, to the place of beginning.

To George Washington, beginning at a point $46\frac{2}{3}$ chains north of the southwest corner of said section, and running thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To Mary H. Carr, beginning at a point $46\frac{2}{3}$ chains north, and six chains east of the southwest corner of said section, and running thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains ; thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To George Thomas, beginning at a point $46\frac{2}{3}$ chains north, and twelve chains east of the southwest corner of said section, and running thence east six chains; thence north $6.66\frac{2}{3}$ chains; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To George Luviney, beginning at a point $46\frac{2}{3}$ chains north, and eighteen chains east of the southwest corner of said section, and running thence east six chains; thence north $6.66\frac{2}{3}$ chains; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning; also beginning at a point $53\frac{1}{3}$ chains north, and eighteen chains east of the southwest corner of said section, and running thence east six chains; thence north $6.66\frac{2}{3}$ chains; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To John Donaldson, beginning at a point $46\frac{2}{3}$ chains north and twenty-four chains east of the southwest corner of said section, and running thence east six chains; thence north $6.66\frac{2}{3}$ chains, thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To Charles Gilbert, beginning at a point $53\frac{1}{3}$ chains north of the southwest corner of said section six,and running thence east six chains; thence north $6.66\frac{2}{3}$ chains; thence west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To James H. Givens, beginning at a point $53\frac{1}{3}$ chains north and six chains east of the southwest corner of said section six, and thence running east six chains; north, $6.66\frac{2}{3}$ chains; west six chains, and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To William Brown, beginning at a point $53\frac{1}{3}$ chains north and twelve chains east of the southwest corner of said section six, and running thence east six chains; north $6.66\frac{2}{3}$ chains; thence west six chains; and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To John Huntington, beginning at a point $53\frac{1}{3}$ chains north and twenty-four chains east of the southwest corner of said section six, and running thence east six chains; north $6.66\frac{2}{3}$ chains; west six chains; and thence south $6.66\frac{2}{3}$ chains to the place of beginning.

To Charles Howard, beginning at a point forty chains north and twenty-four chains east of the southwest corner of section six, township twenty, north range three east; thence east six chains; thence north $6.66\frac{2}{3}$ chains; thence west six chains; thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres.

To Edward S. Simmons, beginning at a point forty chains north and six chains east of the southwest corner of section six, township twenty, north range three east; thence east six chains; thence north $6.66\frac{2}{3}$ chains; thence west six chains; thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres.

To Annie Rodney, beginning at a point forty chains north and eighteen chains east of the southwest corner of section six, township twenty, north range three east; thence six chains east; thence north $6.66\frac{2}{3}$ chains; thence west six chains; thence south $6.66\frac{2}{3}$ chains to the place of beginning, containg four acres.

XI.

That said deeds, and each of the same, described the initial corner of the description of the premises therein attempted to be conveyed, as a point forty chains, north of the southwest corner of section six, township twenty, north range three east of the Willamette meridian, whereas the same should have been forty chains, north of the southwest corner of section five, in township twenty, north of range three east of the Willamette meridian, and were signed by the name of John W. Matthews and not by the names of any of the said alleged grantors in said deed, and were otherwise incorrect and void.

XII.

That on the 23d day of March, 1873, the said James H. Givens died intestate, leaving Mary A. Givens his widow and only heir-at-law.

XIII.

That on the 24th day of March, 1873, the said John W. Matthews, still assuming to act under the authority of said instrument, in writing, and without any additional authority, made, executed, acknowledged and delivered a second

deed to each of said stockholders, which correctly stated the section in which the said tracts are situated, and the true initial corner of the description in each, and to which he signed the names of several of the stockholders, as grantors therein, and purported to convey to each of said stockholders the same tract purported to be conveyed to said persons by the said deed of September 5, 1871, but correctly stating the initial corner of said tract, except that in said deeds on March 24, 1873, he attempted to convey to the said Charles Howard, the same tract attempted to be conveyed by said deed of September 5, 1871, to Annie Rodney, and to the said Mary A. Givens, the tract attempted by said deed of September 5, 1871, to be conveyed to James H. Givens, and to George Luviney, the same tract attempted by said deed of September 5, 1871, to be conveyed to him and in addition thereto, the same tract attempted by said deed of September 5, to be conveyed to George Washington. That said deed, executed to Charles Howard, recites that the lot described in the said deed of September 5, 1871, to Annie Rodney, was erroneously conveyed to her.

XIV.

That since March 24, 1873, the taxes upon said property have been assessed to the several persons named in said deeds, in severalty, and have been paid by them and their successors in interest.

XV.

That complainant herein has purchased, and is the owner of all the interest of said James H. Givens and Mary A. Givens, his widow, in said tract, whether the same has been divided or is an undivided interest.

That in the year 1888, the defendant, Samuel Coulter, purchased in good faith, and for a valuable consideration, all the interest of Annie Rodney, (now Annie Perry) in said undivided tracts, and received from her and Daniel Perry, her husband, a deed of bargain and sale, conveying to him the same.

XVI.

That in the year 1885, the said Charles Gilbert died intestate, leaving George A. Gilbert, his brother, and sole heir-at-law, and the said defendant, Samuel Coulter, is now

the owner in fee simple, by mesne conveyances from the said George A. Gilbert, of all the interest of the said George A. Gilbert, in said tracts of land.

XVII.

That on the 24th day of March, 1873, the said Matthews, acting under said power of attorney, conveyed to the defendant, John Donaldson, one of the original stockholders in said corporation, a tract of land described as follows: Beginning at a point 46.66⅔ chains north and twenty-four chains east of the southwest corner of section five, township twenty, north of range three east; thence east six chains; thence north 6.66⅔ chains; thence west six chains; thence south 6.66⅔ chains to the place of beginning, containing four acres. That the said Donaldson accepted said deed and thereafter, on the 15th day of April, 1873, conveyed said tract to H. C. Clement, by warranty deed; that said Clement thereafter, on the 15th day of December, 1882, conveyed to W. B. Kelly the northeast one acre of said tract by warranty deed; that said Kelly and wife thereafter, on the 25th day of January, 1883, conveyed said one acre by warranty deed to Morris Gross, who is now in possession thereof under said conveyance. That said Clement conveyed said lands by divers mesne conveyances so that Mary L. Smith and Sheldon Allen, as tenants in common, are now seized and in the possession by conveyance to them of all the following portions thereof, to-wit:

Beginning at a point 46⅔ chains north and twenty-four chains east of the southwest corner of said section five; thence north 6⅔ chains; thence east three chains; thence south 3⅓ chains; thence west three chains; thence south 3⅓ chains; thence east three chains; thence south 3⅓ chains; thence west six chains; thence east three chains; thence south 3⅓ chains; thence west six chains to the place of beginning, containing three acres; except the following mentioned lots in the said three acres, as the same would appear upon a subdivision of said tract into lots, blocks, streets and alleys, according to the general plan of subdivision of the City of Tacoma, within the limits of which city the said tract lies, viz: Lots numbers eleven and twelve in block 102 8; lots one, two and three in block 1127; and lot number six in block 1128, and with the exception of the lots above mentioned, the said Sheldon

Allen and Mary L. Smith are now the owners and in possession of, and entitled to the possession of said three acres. Said lands were conveyed to these complainants, Sheldon Allen and Mary L. Smith, by two certain deeds, as follows: A deed dated January 10th, 1878, and recorded in the office of the auditor of Pierce county, April 8th, 1879, in book seven of deeds, at page eighty-six; and by a certain other deed dated September 13th, 1879, and recorded in the office of the auditor of said county on the 25th day of September, 1879, in book seven of deeds, at page 356; in which said two deeds said lands are not described by metes and bounds, but as lots numbered 4, 5, 6, 7, 8, in block numbered 1127, and the west fractional parts of lots 1, 2, 3 and 4, in block numbered 1126, in New Tacoma, as shown by the official plat of said New Tacoma on record in the office of the county auditor of said county; and those certain other lots shown by said plat, as follows: Lots 1, 2, 3, 4, 5 and 6, in block 1129; lots 1, 2, 3, 4, 5, and fractional lot 7, in block 1128; and fractional lots 4 and 5; and lots 6, 7, 8, 9 and 10, in block 1128; and fractional lots 10, 11 and 12, in block 1029; which lots embrace the identical lands above described by metes and bounds, and none other; and are the same lands conveyed by the defendant, H. C. Clement, to John E. Burns by warranty deed, dated September the 11th, 1873, and recorded September 19th, 1873, in book four of deeds, at page 210.

XVIII.

That on the 24th day of March, 1873, the said Matthews acting under said power of attorney, conveyed to the defendant, John Huntington, one of the original stockholders in said corporation, a tract of land described as follows: Beginning at a point 53.33⅓ chains north, and twenty-four chains east of the southwest corner of section five, township twenty, north range three east, thence east six chains; thence north 6.66⅔ chains; thence west six chains; thence south 6.66⅔ chains to place of beginning, containing four acres. And he, the said Huntington, afterwards sold and conveyed certain portions thereof, to-wit: The west half of said four acre tract, to Mary A. Cottle, by warranty deed, dated June 23d, 1873; that said Mary A. Cottle, thereafter, on June 17th, 1881, conveyed said west half of said tract to Walter M. Lee; that said Walter M. Lee, on the 16th

day of July, 1881, conveyed the south half of the tract so conveyed to him, to Byron A. Young ; that said Young, on the 27th day of May, 1882, conveyed said land by warranty deed to one John L. Binder ; that said Binder on the 27th day of November, 1882, conveyed the same by warranty deed to one Jacob Stumpfle ; that said Stumpfle on the 5th day of March, 1881, conveyed the said by quitclaim deed to Hattie B. Child, who is now in possession thereof, under said conveyance. That the said Walter M. Lee died intestate, before the commencement of this action, possessed of all the interest, legal or equitable, which he acquired by said deed to him by the said Mary A. Cottle ; that he left him surviving as his only heirs-at-law, the said Walter H. Lee, Martha A. Lee, Esther Lee, and Mattie G. Fulmer, wife of the said E. O. Fulmer, who as such heirs-at-law, have succeeded to the interests of said decedent, in said lands, as tenants in common, and who have ever since been, and now are, in possession thereof, as such tenants in common.

XIX.

That on the 24th day of March, 1873, the said Matthews, acting under said power of attorney, conveyed to George Thomas, one of the original stockholders in said corporation, a tract of land described as follows : Beginning at a point $46.66\frac{2}{3}$ chains north, and twelve chains east of the southwest corner of section five, township twenty, north of range three east, thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains ; thence south $6.66\frac{2}{3}$ to place of beginning, containing four acres. That the defendant, Louisa M. Flowers, is the devisee of all the interest in said original tract of land of George Thomas, who was one of the stockholders of said corporation, and to whom said Matthews conveyed one of said tracts of land, as hereinbefore stated ; that said will was duly admitted to probate in the probate court of Pierce county, Washington territory, December 2d, 1875, and was recorded in book five of deeds, in the office of the auditor of said county, at page 169.

XX.

That on the 23d day of January, 1873, the said Matthews, acting under said power of attorney, conveyed to William Brown, who was a stockholder in said corporation,

and one of the makers of the said power of attorney to said Matthews, and who at all times after the making of said power of attorney and said conveyance, acquiesced in said attempted partition, without dissent, a tract of land described as follows: Beginning at a point 53.33⅓ chains north and twelve chains east of the southwest (S. W.) corner of section five, township twenty, north range three east, thence east six chains, thence north 6.66⅔ chains, thence west six chains, thence south 6.66⅔ to the place of beginning, containing four acres, being tract numbered three as laid down on the map made for the Workingmen's Joint Stock Association, and on which the division of the sixty acre tract, of which the above is a part, was based. The above land is located in section five, township twenty, north range three east, Willamette meridian. That the said Brown afterwards, by warranty deed, conveyed the land so conveyed to him by said Matthews to one C. P. Ferry; that said Ferry conveyed the same by warranty deed to William B. Kelly; that said Kelly, on the 22d day of March, 1883, conveyed the same by warranty deed to Henry C. Bostwick, who is in possession thereof, under said conveyance; that said Brown, on April 3, 1883, conveyed by warranty deed the south half of the northeast quarter of said four acre tract so conveyed to him by said Matthews to J. B. Welsh, who is now in possession thereof, under said conveyance. That said Brown conveyed the southeast one acre of said tract to Thomas A. Cottle by warranty deed on the 20th day of June, 1873, that said Cottle thereafter, on the 11th day of July, 1881, conveyed the same to Julius Kley by warranty deed; that said Kley, on the 24th day of May, 1883, conveyed the same by warranty deed to John L. Binder, who, on the 12th day of September, 1882, conveyed the same by warranty deed to Thomas C. Armstrong, who is now in possession thereof under said conveyance.

XXI.

That on the 24th day of March, 1873, said Matthews, acting under said power of attorney, conveyed to Philip Francis, who was one of the original stockholders in said corporation, and one of the signers of said power of attorney, and who at all times acquiesced in said attempted partition, the tract of land described as follows: Beginning at a point forty chains north of the southwest corner of section

five (5), township twenty (20), north range three east, thence east six chains, thence north $6.66\frac{2}{3}$ chains, thence west six chains, thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres. That the said Francis accepted the said attempted partition and conveyance made to him by said John W. Matthews without dissent; that afterwards, on the 23d day of June, 1873, he conveyed the east half of said four acre tract by warranty deed to Thomas J. Cottle, who afterwards, on the 8th day of September, 1873, conveyed the same by warranty deed to F. S. Akin, who is now in possession thereof, under said conveyance.

XXII.

That on the 24th day of March, 1873, the said Matthews acting under said power of attorney, conveyed to Charles Howard, who was one of the original stockholders in said corporation, and one of the makers of said power of attorney to said Matthews, and who at all times thereafter acquiesced in the said attempted partition, a tract of land described as follows : Beginning at a point forty chains north and twenty-four chains east of the southwest corner of section five (5), township twenty, north range three east, thence east six chains, thence north $6.66\frac{2}{3}$ chains, thence west six chains, thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres. Also the following described parcels erroneously conveyed to Anna Rodney, to-wit : Beginning at a point forty chains north and eighteen chains east of the southwest corner of section five, township twenty, north range three east, thence six chains, thence north $6.66\frac{2}{3}$ chains, thence west six chains, thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres. That said Howard accepted said deed, and at all times acquiesced without dissent in said attempted partition made to him by said Matthews in the partition attempted to be made; that thereafter, on the 25th day of April, 1882, he executed a power of attorney to one Frank Clark, authorizing him to sell and convey said lands; that afterwards, on the 2d day of September, 1882, he, by his said attorney, executed a warranty deed conveying an undivided half interest in a tract of land described as beginning at a point forty chains north and twenty-four chains east of the southwest corner of section five, thence six chains east, thence north $6\frac{2}{3}$ chains, thence west six chains, thence south $6\frac{2}{3}$ chains to

the place of beginning, containing four acres; also the following described parcel, erroneously conveyed to Annie Rodney, to-wit: Beginning at a point forty chains north and eighteen chains east of the southwest corner of said section five, thence east six chains, thence north $6\frac{2}{3}$ chains, thence west six chains, thence south $6\frac{2}{3}$ chains to the place of beginning, containing four acres.

That said Howard had no right or title to said last described tract of land; that Samuel Coulter has succeeded to all the rights and interest of the said Annie Rodney therein, by deed of conveyance from her to him, as herein more fully set forth. That upon the 2d day of September, 1882, the said Charles Howard, by his attorney, Frank Clark, conveyed an undivided one-half interest in both of the tracts herein described, to one William Thompson, by warranty deed; that on the 4th day of November, 1882, said Thompson conveyed said land by warranty deed to Van Ogle; that said deed described both of the tracts herein described; that neither said Howard, nor said Thompson as his grantee, had any right or interest in so much of said lands as had been prior to said conveyance by said Matthews to said Howard conveyed, or had been intended to be conveyed to said Annie Rodney. That on the 19th day of March, 1881, said John Carson conveyed by deed of quitclaim to said Van Ogle, all his interest in the north half of the easterly of said two four acre tracts, and the south half of the westerly of said two tracts, that upon the same day the said Van Ogle conveyed by quitclaim deed to said Carson, all his interest in the south half of the easterly of said two four acre tracts, and all his interest in the north half of the westerly of said two tracts; that the defendant Annie Ogle, has succeeded by deed of conveyance from said Van Ogle, to all the interest at any time held by said Van Ogle to each and both of said tracts.

XXIII.

That on the 24th day of March, 1873, the said Matthews, acting under said power of attorney, conveyed to one George Luviney, one of the original stockholders in said corporation, a tract of land described as follows: Beginning at a point $53\frac{1}{3}$ chains north, and eighteen chains east of the southwest corner of said section five; thence

east six chains ; thence north $6\frac{2}{3}$ chains ; thence west six chains ; thence south $6\frac{2}{3}$ chains to the place of beginning, containing four acres.

That said Luviney accepted said deed, and thereafter on the 21st day of June, 1873, conveyed the lands herein described to one Thomas J. Cottle by warranty deed ; that thereafter on July 5th, 1873, said Cottle conveyed said lands to one David Jacobi ; that afterwards on the 30th day of March, 1883, said Jacobi conveyed said lands to one George B. Kandle ; that afterwards on the 20th day of April, 1883, said Kandle conveyed said lands to the defendant, William H. Fife, who is now in possession thereof under said conveyance.

XXIV.

That the said Louisa M. Flowers, on the 11th day of October, 1887, conveyed the southwest one acre of the tract conveyed to her by said Matthews by warranty deed, to one L. F. Cook, who afterwards on the 21st day of January, 1888, conveyed the same by warranty deed to D. S. Marvin, who is now in possession thereof under said conveyance.

XXV.

That on the 2d day of May, 1883, the said Louisa M. Flowers, by warranty deed conveyed the southeast one acre of the four acre tract conveyed to her by said Matthews, to J. B. Welsh, who is now in possession thereof under such conveyance.

XXVI.

That Mary H. Carr was one of said original corporators ; that said Matthews, under said power of attorney, conveyed to her on March 24, 1873, four acres of said land described as follows : Beginning at a point $46\frac{2}{3}$ chains north and six chains east of the southwest corner of said section five ; thence east six chains ; thence north $6\frac{2}{3}$ chains ; thence west six chains ; thence south $6\frac{2}{3}$ chains to the place of beginning.

That afterwards, February 2, 1883, said Mary H. Carr conveyed the following portion of said lands to one George B. Kandle, to-wit: Commencing at a point $46\frac{2}{3}$ chains north and six chains east of the southwest corner of said section five; thence east three chains; thence north $3\frac{1}{3}$ chains; thence east three chains; thence north $3\frac{1}{3}$ chains; thence west three chains; thence south $6\frac{2}{3}$ chains to the place of beginning, containing three acres; that afterwards, February 13, 1883, said Kandle conveyed said lands to H. C. Bostwick, who is now in possession thereof under said conveyance.

XXVII.

That Edward S. Simmons was one of the original stockholders of said corporation; that said Matthews, under said power of attorney, conveyed to said Simmons, March 24, 1873, a portion of said tract described as follows: Beginning at a point forty chains north and six chains east of the southwest corner of said section five, in township twenty, range three east, in Pierce county, Washington territory; thence east six chains; thence north $6\frac{2}{3}$ chains; thence west six chains; thence south $6\frac{2}{3}$ chains to the place of beginning, containing four acres; that said Simmons accepted said deed and afterwards, May 3, 1873, conveyed the northwest one acre of the lands therein described to Frank E. Hodgkin; that afterwards, on the 19th day of October, 1883, the said Simmons executed a further and other conveyance by warranty deed, in which said lands were described as follows: All that lot or parcel of land beginning $46\frac{2}{3}$ chains north and six chains east of the southwest corner of section five, aforesaid; thence south $3\frac{1}{3}$ chains; thence east three chains; thence north $3\frac{1}{3}$ chains, and thence west three chains to the place of beginning, containing one acre, more or less. These words follow the description: This deed is given for the purpose of correcting and confirming a certain deed given by Edward S. Simmons to Frank E. Hodgkin, of date May 3, 1873, which deed is recorded in book three, on page 737, of records of deeds for Pierce county, Washington territory.

Afterwards, March 2, 1888, said Hodgkin conveyed said lands by warranty deed to Dana Child, who afterwards,

April 11, 1888, conveyed said lands by warranty deed to B. A. Bissell, who is now in possession thereof under said conveyance.

XXVIII.

That Annie Rodney was one of the original stockholders in said corporation, and as such was entitled to thirty four-hundred-and-sixty-fourths (30-464) of the capital stock hereof, and upon conveyance of the lands owned by said corporation to the stockholders thereof, upon the 10th day of February, 1871, she became entitled to have and to hold in her own right as a tenant in common with all the other stockholders in said corporation herein before named, thirty four-hundred-and-sixty-fourths (30-464) of said original tract of land ; that afterwards, on the 9th day of September, 1871, under the supposed authority given him by the power of attorney made by said stockholders to him, the said Matthews attempted to make partition of said land and executed deeds to said several stockholders for their several interests, that among others he executed to said Annie Rodney a deed for a tract of land therein described as follows : Beginning at a point forty chains north and eighteen chains east of the southwest corner of section six, township twenty, north range three east ; thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains ; thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres.

That the purpose and intent of said conveyance to each and every of said stockholders was to convey lands in section five, according to the description contained in said several deeds ; that said lands were afterwards conveyed by said Matthews to the said Charles Howard, as hereinbefore set out, that in truth and in fact said Howard was not entitled to a conveyance thereof, but the same belonged to, and was the property of the said Annie Rodney ; that the defendant, Samuel Coulter, has, by conveyance from her, succeeded to all her right and interest therein, as hereinbefore set forth.

XXIX.

That one James H. Givens was one of the original stockholders in said corporation, and as such was entitled to thirty four-hundred-and-sixty-fourths (30-464) of the

stock thereof ; that he died in the year 1873 intestate, and without having received a conveyance in severalty of his interest in said lands ; that he left him surviving his widow, Mary A. Givens, who was his sole heir-at-law. That afterwards, on the 22d day of March, 1873, said Matthews, acting under said power of attorney, conveyed to said Mary A. Givens a portion of said original tract described as follows : Beginning at a point 53.33⅓ chains north, and six chains east of the southwest corner of section five, in township twenty, north range three east; thence six chains east ; thence north 6.66⅔ chains ; thence west six chains ; thence south 6.66⅔ chains to the place of beginning, containing four acres. That on the 17th day of October, 1888, the said Mary A. Givens sold and conveyed to the complainant herein, the said tract of land, who is now in possession thereof under said conveyance.

XXX.

That Charles Gilbert was one of the original stockholders in said corporation, and, as such, entitled to thirty four-hundred-and-sixty-fourths of the capital stock of said corporation ; that, on the 24th day of March, 1873, the said Matthews, acting under said power of attorney, conveyed to the said Gilbert, a portion of said tract described as follows : Beginning at a point 53.33⅓ chains north of the corner of section five, in township twenty, north range three east ; thence six chains east ; thence north 6.66⅔ chains ; thence west six chains ; thence south 6.66⅔ chains to the place of beginning, containing four acres. That the said Samuel Coulter has succeeded by conveyance thereof, to all the rights and interest of the said Gilbert in said lands, and is now in possession thereof.

XXXI.

That George Washington was one of the original stockholders of the said corporation, and as such entitled to thirty four-hundred-and-sixty-fourths (30-464) of the capital stock thereof. That in said partition attempted to be made of said lands by said Matthews under said power of attorney, on the 9th day of September, 1871, he conveyed to said George Washington a tract of land described as follows : Beginning at a point 46.66⅔ chains north of the

southwest corner of section six, township twenty, north range three east; thence six chains east; thence north $6.66\frac{2}{3}$ chains; thence west six chains; thence south $6.66\frac{2}{3}$ chains to the place of beginning, containing four acres. That in truth and in fact, said description was intended to embrace lands described in section five instead of section six; that afterwards said Matthews conveyed the said lands to George Luviney, but the said Washington was, at all times, the equitable owner thereof. That the defendant, Annie Ogle, has, by conveyance thereof, succeeded to all the rights and interest of the said Washington.

XXXII.

That the said George Luviney died in the year 1875, being, at the time of his death, entitled to hold all of the interest conveyed by said Matthews to said George Riley in the following tract of land: Beginning at a point forty chains north and twelve chains east of the southwest corner of said section five, township twenty, north of range three east of the Willamette meridian, running thence east three chains, thence north $3\frac{1}{3}$ chains, thence west three chains, thence south three chains to the place of beginning. That on the 24th day of March, 1873, the said John W. Matthews, assuming to act under said power of attorney, conveyed to the said Luviney the following tracts in addition to the tract hereinbefore described as having been conveyed by said Luviney to Thomas J. Cottle, and thereafter by mesne conveyances to the defendant, William H. Fife, to-wit: Beginning at a point $46\frac{2}{3}$ chains north of the southwest corner of said section five, township twenty, north of range three east of the Willamette meridian, running thence east six chains, thence north $6\frac{2}{3}$ chains, thence west six chains, thence south $6\frac{2}{3}$ chains to the place of beginning; also that certain other tract beginning at a point $46\frac{2}{3}$ chains north and eighteen chains east of the southwest corner of said section five, township twenty, north of range three east of the Willamette meridian, running thence east six chains, thence north $6\frac{2}{3}$ chains, thence west six chains, thence south $6\frac{2}{3}$ chains to the place of beginning. That at the time of his death, the said Luviney was seized and possessed of all the interest in said lands, excepting that theretofore conveyed by him, and now held by the said Fife, which he received either by virtue of said deed by said Matthews to

him, or to which he was entitled as one of the original stockholders in said corporation as hereinbefore set forth. That he died intestate, leaving him surviving as his sole heir-at-law, one Sarah Elizabeth Jane Allen, who thereafter conveyed said lands to the defendant, Seymour R. Allen. That the first of the four tracts in this paragraph described was, until after the commencement of this suit, claimed by the defendant Annie Van Ogle, under a conveyance thereof by George Washington to her; that the said Annie Van Ogle and Seymour Allen have, since the commencement of this suit, agreed upon a compromise of their claims to said tract; that the said Annie Van Ogle has conveyed by conveyance duly executed by her, and her husband Van Ogle, all her interest in the said tract to the said Allen who is now in possession thereof under said conveyance.

XXXIII.

That the defendant, H. C. Clement, has by mesne conveyances, succeeded to all of the rights and interest of the said Philip Francis, in and to the following described tract, to-wit: An undivided one-third of the northwest one-fourth of the four acre tract hereinbefore referred to as having been conveyed by the said Matthews to the said Francis, the said quarter of said four acre tract, being described as follows: Beginning at a point $3.66\frac{2}{3}$ chains north of the southwest corner of the northwest quarter of section five, township twenty, north of range three east of the Willamette meridian; thence three chains east; thence north $3\frac{1}{3}$ chains; thence west three chains; thence south $3\frac{1}{3}$ chains to the place of beginning. That the said Clement further makes claim adversely to the claim of the defendant, Henry C. Bostwick, to the following described tract: Beginning at a point $56\frac{2}{3}$ chains north, and twelve chains east of the southwest corner of section five, township twenty, north of range three east; thence three chains east; thence north $3\frac{1}{3}$ chains; thence west three chains; thence south $3\frac{1}{3}$ chains to the place of beginning.

But it is found and adjudged that said Clement has no right or title thereto as against the claims of the said Bostwick, and is further found and adjudged that the said Clement has no right, title or interest in, or to any of the said

lands described in the bill of complaint and cross-bills herein, other than the undivided one-third interest in the one acre tract hereinbefore described.

XXXIV.

It is found and adjudged that the defendant, John Plume, has by divers mesne conveyances succeeded to all the right, title and interest of the said George P. Riley, in and to the one-fourth of the tract conveyed by said Matthews to said Riley as hereinbefore set forth, and that he is now in possession thereof.

XXXV.

It is further found and adjudged that the defendant, C. A. Gove, has no right, title or interest in or to any of the said lands described in said bill of complaint.

XXXVI.

It is further found and adjudged that the defendant, John Donaldson, has no right, title or interest in any of the lands in the bill of complaint herein described.

XXXVII.

It is further found that the said partition so attempted to be made by the original stockholders in said corporation and by said Matthews, in the deeds executed by him under the power conferred or attempted to be conferred on him by them, was not valid or effectual in law to operate as a partition of said lands, or to vest in the grantees named in said deeds in severalty the legal title to the lands therein respectively described; and it is further found that the partition so attempted to be made as between the said parties and all of them was in all respects fair, equitable and just, that the said deeds were executed and acted upon and conveyances made thereunder in good faith and with the belief upon the part of the persons so making, and of those receiving the same, that said partition was valid in law to vest in the grantees named in the deeds of said Matthews in severalty the legal title to the lands therein

described. It is further found that each and every of said several parties named in said original deeds and those claiming under them, have paid all taxes and assessments upon the said lands so allotted to them respectively since said attempted partition, and have since in good faith exercised all of the usual acts of ownership over said lands.

It is therefore ordered, adjudged and decreed that each and all of the parties to this suit be estopped, each as against the other, from asserting or claiming any right, title or interest to any of said lands, except to that particular tract allotted to him or her, or to whose under whom they each respectfully made claim, as hereinbefore set forth, except F. V. McDonald and Samuel Coulter, who are not estopped, but who assent to this decree, subject, however, to the further provisions herein contained, as to the partition of said lands.

It is further adjudged and decreed, that partition be made among the several parties to this action, as nearly as practicable according to their respective interests, or the interests of their several grantors, as the same are set forth and described in the deeds of the said Matthews, and that the said lands be allotted to them as nearly as practicable, according to the partition then attempted to be made, but if it shall be ascertained upon a true survey of said original tract, that there is an excess or deficiency, so that the same cannot be divided into exact accordance with said attempted partition, then the same shall be made so as to give to each of the present owners thereof as their respective interests are hereinbefore set forth, his or her equitable interest therein, upon the basis of said original partition, and the interest of said original stockholders in the capital stock of said corporation, as the same are respectively hereinbefore set forth. It is further ordered and directed that A. Reeves Ayres be and he is hereby appointed commissioner of this court, with authority to employ some competent surveyor to locate and survey said lands, and to make a plat thereof, showing the location and area of the respective interests of each and every of the parties to this suit. And said commissioner is directed to procure an abstract of the title to said original tract of land, showing the several conveyances thereof by each and every of the respective grantees in the deeds of the said Matthews, and of all

of the parties claiming under them at any time prior to the commencement of this action, and that said survey, plat and abstract be made a part of his report of his proceedings under this decree.

It is further ordered and adjudged that the final partition of said lands and the determination of all questions not herein expressly determined and adjudged be reserved until the coming in of the report of the said commissioner.

C. H. HANFORD, *Judge.*

Copy of decree signed this 25th November, 1891.

"EXHIBIT D."

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH JUDICIAL CIRCUIT, DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. McDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH, *Defendants.*
No. .... Answer.

Come, now, the above named Dolphus B. Hannah and Kate E. Hannah, and for answer to the complaint of the plaintiff herein, they allege as follows :

I.

They deny each and every allegation contained in paragraph second of said complaint.

II.

They admit that they are in the actual possession of said premises, but deny that they wrongfully withhold the same from said plaintiff.

III.

They deny that they wrongfully entered into the possession of said premises, and deny that they wrongfully withhold the same from plaintiff.

And for further answer and defense these defendants allege :

I.

That on the 5th day of November, A. D. 1881, all and singular the premises described in plaintiff's complaint were within the limits established by an act of the legislative assembly of the Territory of Washington, approved November 5th, 1881, entitled : " An Act to Confer a City Government upon New Tacoma," as the corporate limits of New Tacoma ; and that under and by virtue of said act of said legislative assembly, the City of New Tacoma was duly incorporated.

II.

That under the provisions of section thirty-four of said act, the city government of New Tacoma had power and authority to assess, levy and collect taxes for general municipal purposes upon all property, both real and personal, situate within the corporate limits, which was, by law, taxable for territorial and county purposes.

III.

That in the year, A. D. 1882, there was duly levied and assessed by the city government of New Tacoma, a tax upon all the real estate within the limits of said city, including the premises described in the complaint herein, for general municipal purposes. That the said premises, being so, as aforesaid, within the corporate limits of New Tacoma, were by law taxable for territorial and county purposes, and that one Mary A. Givens, was then and there the record owner, also the owner in fact of said premises.

IV.

That in the year, A. D. 1882, there was duly levied and assessed by the city government of New Tacoma a tax upon all the real estate within the limits of said city, including the premises described in plaintiff's complaint, for general municipal purposes, and that all and singular the said premises were duly assessed to said Mary A. Givens, for said year.

V.

That under section sixty-two of said act incorporating New Tacoma, it is provided that the council of said corporation must provide by ordinance within what time all municipal taxes, whether general or special, must be paid to the treasurer, and when the taxes, not so paid, become delinquent; also fixing the time when the tax roll must be returned to the council.

VI.

That in pursuance of the provisions of said section sixty-two, the council of said corporation did provide by ordinance that all municipal taxes must be paid to the treasurer by the 31st day of December, 1882, and that all taxes not so paid should be delinquent; which ordinance was duly passed the 24th day of October, 1882.

VII.

That said premises be so, as aforesaid, assessed to the said Mary A. Givens.

VIII.

That thereafter, the city council of said city, ordered the clerk of said city to deliver to the tax collector of delinquent taxes, (the sheriff of the county,) the tax roll of 1882, upon which the said property described in the complaint herein, was assessed to the said Mary A. Givens, as aforesaid, and caused to be attached thereto a warrant to the said sheriff of Pierce county authorizing the said sheriff to collect all delinquent taxes, as provided by law, and in accordance with the provisions of section sixty-three of said city's charter, and section twenty-nine hundred and three of chapter twenty-five of the Code of Washington.

IX.

That in pursuance of the directions and instructions so given by said city council, the clerk of said city, did, on the 23d day of January, 1883, deliver to the sheriff of Pierce county the duplicate assessment roll containing a list of all persons and property owing taxes in and to the

said City of Tacoma, together with the costs and charges thereon, which said duplicate city assessment roll did then and there include the property described in the complaint herein, the same being assessed thereon for the year ending December 31, 1882, for said municipal taxes, to the said Mary A. Givens.

X.

That on the 2d day of April, 1883, the said sheriff of Pierce county entered in the duplicate assessment roll, immediately following his supplemental assessment, the affidavit required by section twenty-nine hundred and fifty of the Code of Washington territory, to the effect that after due and dilligent search no personal property could be found to pay the taxes assessed against the persons and property described in said duplicate assessment roll remaining unpaid, and that the taxes due from said Mary A. Givens assessed on the land described in plaintiff's complaint, had not been paid, and that the same then and there appeared on said duplicate assessment roll as delinquent and wholly unpaid ; that the said taxes so due from said Mary A. Givens and assessed on said land were then delinquent and unpaid and that no personal property could be found belonging to said Mary A. Givens, out of which said taxes could be paid.

That under the provisions of section twenty-nine hundred and sixteen, of the Code of Washington territory, the said sheriff gave public notice of the sale of the real property described in said delinquent list, for the total amount of taxes then due thereon, including printing, interest and costs to date of sale, by publishing for three successive weeks, immediately prior to the first Monday in May, 1883, the said delinquent list, in the manner provided by law, in New Tacoma, Pierce county.

XI.

That said delinquent list contained a notification that all real estate, described thereon, on which the taxes for the preceding year, to-wit : The year 1882, had not been paid would be sold at public auction to satisfy the taxes, penalty, interest and costs due the city from the owners thereof for said year, at New Tacoma, in front of the court house

door in said county and territory; that said sale would commence on the first Monday in May, and continue until said real estate was sold, as required by law, which notice, so published as aforesaid, centained a description of all property to be sold and the names of the persons to whom said property was assessed; and that the said delinquent list, so published as aforesaid, contained a description of the property described in plaintiff's complaint, assessed to the said Mary A. Givens.

XII.

That in pursuance of said notice, so published and given as aforesaid, the said sheriff did on the 7th day of May, 1883, offer the said tract of land, described in plaintiff's complaint, for sale between the hours of ten o'clock A. M. and three o'clock P. M., of that day, to pay said taxes, and charges due thereon, at public auction in front of the court house door in said New Tacoma; that at said sale D. B. Hannah, one of the defendants herein, was the bidder who was willing to take the least quantity of, or the smallest portion of the interest in said land, and pay the taxes, costs and charges due thereon, including one dollar for the certificate of sale, which amounted to the sum of four and 78-100 dollars.

XIII.

That at said sale the said D. B. Hannah purchased the same, and then and there paid the full amount of said taxes, costs and charges, and that thereupon the treasurer of said County of Pierce delivered to said D. B. Hannah the usual certificate of sale; and the said D. B. Hannah thereby became the purchaser of the land described in the plaintiff's complaint, so sold for taxes as aforesaid. That the said tract was sold subject to redemption, pursuant to the statutes in such cases provided, but that no person redeemed said property from said sale, and no redemption was ever made thereof.

XIV.

That on the 2d day of April, 1886, the said D. B. Hannah duly assigned said certificate of sale, and all his rights thereunder, to one W. B. Kelly, as appears from said certificate of sale, and the assignment thereof.

XV.

That on the 16th day of September, 1886, one Lewis Byrd, then being the sheriff of said County of Pierce, Territory of Washington, by virtue and in pursuance of the statutes in such cases made and provided, did, as sheriff, in the name of the Territory of Washington, execute and deliver to said W. B. Kelly a deed conveying to said W. B. Kelly, his heirs and assigns forever, all and singular the premises described in plaintiff's complaint, in the manner and form provided by law.

XVI.

That the said deed, so as aforesaid made, executed and delivered by said sheriff to said W. B. Kelly, was duly recorded in the auditor's office of said Pierce county, Washington territory, on the 9th day of October, 1886, in book nineteen of deeds, at pages 706 *et seg.*

XVII.

That thereafter on the 1st day of March, 1887, said W. B. Kelly and Mary M. Kelly, his wife, for and in consideration of the sum of one thousand dollars, conveyed to the defendant Dolphus B. Hannah, by warranty deed, all and singular the premises described in plaintiff's said complaint, since which time the defendants have been in the open, notorious and exclusive possession of said premises, and have made permanent improvements thereon costing five thousand dollars.

XVIII.

And these defendant's further say that plaintiff's right to maintain his action to recover the premises described in his complaint herein, so as aforesaid sold for taxes, is barred by the provision of section twenty-nine hundred and thirty-nine of the Code of Washington, which provides that all suits for recovery of land sold for taxes must be commenced three years from the date of the recording of the tax deeds.

Wherefore: These defendants pray judgment against the plaintiff to be dismissed hence without day, and for their costs and disbursements herein.

JUDSON & SHARPSTEIN,
Attorneys for Defendants.

State of Washington, }
County of Pierce. }

D. B. Hannah, being duly sworn, on oath says: That he is the defendant in the above action; that he has read the foregoing answer, and knows the contents thereof, and that he believes it to be true.

D. B. HANNAH.

Subscribed and sworn to before me, this 11th day of January, 1892.

[*Notarial Seal.*] J. A. WINTERMUTE,

Notary Public, Residing at Tacoma, Pierce Co., Washington.

Filed January 19, 1892.

The Weekly Ledger, New Tacoma, Washington territory, Friday, May 4, 1883. Sheriff's notice of delinquent tax sale.

Under and by virtue of an act of the legislative assembly of the Territory of Washington, approved November 5th, A. D. 1881, I will sell at public auction to the highest bidder for cash, at the court house door, in the City of New Tacoma, for the delinquent city taxes for the years 1882-83, the real estate described in the following list, unless the same shall be redeemed by the person to whom assessed, or their agents. The sale will commence on Monday, May 7th, 1883, at ten o'clock A. M., and continue from day to day, between the hours of ten A. M. and five P. M., until such real estate shall have been sold, or twice offered for sale.

HENRY WINSOR,
Sheriff Pierce County. W. T.

Givens, Mary A.— Commencing sixty chains west and six chains east of the northwest corner of section five, township twenty, north range three east of Willamettte

meridian; thence running east six chains; thence south $6\frac{2}{3}$ chains; thence west six chains; thence north $6\frac{2}{3}$ chains, to the place of beginning, four acres.....$4.78.

Date of first publication, April 13th, 1883.

ENDORSENENT.

Sheriff's notice of delinquent tax sale.

"EXHIBIT E."

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH JUDICIAL CIRCUIT, DISTRICT OF WASHINGTON.—WESTERN DIVISION.

F. V. MCDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH, *Defendants.*

Amended answer.

Come, now, the above named defendants, and by leave of court first obtained, file this, their amended answer, to the complaint of the plaintiff herein, and answering said complaint.

I.

Deny each and every allegation contained in the second paragraph of said complaint.

II.

Admit that they are in the actual possession of the premises described in plaintiff's said complaint, but deny that they are wrongfully withholding the same from said plaintiff.

III.

They deny that plaintiff was ever seized of the premeses described in the said complaint, and deny that they wrongfully entered into possession of said premises, and deny that they wrongfully withhold the same from plaintiff.

And for a further answer and defense defendants allege:

I.

That at all the times herein mentioned all and singular the premises described in plaintiff's complaint were within the limits established by an act of the legislative assembly of the Territory of Washington, approved November 5, 1881, and entitled, "An Act to Confer a City Government upon New Tacoma," as the corporate limits of "New Tacoma;" and that under and by virtue of said act of said legislative assembly, the city of "New Tacoma" was duly incorporated.

II.

That under the provisions of sub-division one, of section thirty-four of said act, the city government of "New Tacoma" had the power and authority to assess, levy and collect taxes for general municipal purposes upon all property, real and personal, within the corporate limits of said city, which were by law taxable for territorial and county purposes.

III.

That the premises described in plaintiff's complaint were within the corporate limits of said City of New Tacoma, and were by law taxable for territorial and county purposes.

IV.

That in the year A. D., 1882, there was duly levied and assessed by said city government of New Tacoma, a tax upon all the real estate within the corporate limits of said city, including the premises described in plaintiff's complaint for general municipal purposes, and that all and singular the said premises were duly assessed to one Mary A. Givens for said year.

V.

That under the provision of section sixty-two, of said act, it is provided that the council of "New Tacoma" must provide by ordinance within what time all municipal taxes

must be paid to the treasurer, and that the tax not so paid shall become delinquent. Also fixing the time when the tax roll must be returned to the city council.

VI.

That in pursuance of the provisions of said section sixty-two, the council of said City of "New Tacoma" did provide by ordinance, that all municipal taxes should be paid to the treasurer of said city on or before the 31st day of December, 1882, and that all taxes not paid at that time shall be delinquent, which said ordinance was duly passed the 24th day of October, 1882, and is entitled, "An Ordinance Levying the Annual Tax for General Municipal Purposes for the year A. D. 1882."

VII.

That taxes, amounting to the sum of three dollars were levied and assessed against the premises described in said complaint, but that the same were not paid within the prescribed time of said ordinance, and thereafter the city council of said city ordered the clerk of said city to deliver to the sheriff of the County of Pierce, Territory of Washington, he being the collector of delinquent taxes of said City of New Tacoma, said tax roll of 1882, upon which the said property described in the complaint herein, was assessed to the said Mary A. Givens, as aforesaid, and caused to be attached thereto a warrant directed to the said sheriff of Pierce county, authorizing said sheriff of Pierce county to collect all delinquent taxes, as provided by law, and in accordance with the provisions of section sixty-three of said act of the legislature, and the provisions of Sec. 2903 of Chapter 225 of the Code of Washington territory of 1881.

VIII.

That in pursuance of the directions and instructions so given by the said city council as aforesaid, the clerk of said city did, on the 23d day of January, 1883, deliver to the said sheriff of Pierce county the duplicate assessment roll of said city, containing a list of all persons and property owing taxes in and to the said City of "New Tacoma," together with the costs and charges thereon, which said duplicate city assessment roll did then and there include the property described

in the complaint herein, the same being assessed thereon for the year ending December 31, 1882, for said municipal taxes to the said Mary A. Givens.

IX.

That on the 2d day of April, 1883, the said sheriff of Pierce county, as collector of the delinquent taxes of said city, entered in the said duplicate assessment roll, immediately following his supplemental assessment, the affidavit required by section twenty-nine hundred and fifteen of the Code of Washington territory, to the effect that after due and diligent search no personal property could be found to pay the taxes assessed against the persons and property described in said duplicate assessment roll remaining unpaid.

X.

That the taxes due to the city from said Mary A. Givens, assessed on the land described in plaintiff's, were not paid and the same then and there appeared on said duplicate assessment roll as delinquent and wholly unpaid.

XI.

That under the provisions of section twenty-nine hundred and sixteen of the Code of Washington territory of 1881, the said sheriff gave public notice of the sale of the real property described in said delinquent list, for the total amounts of taxes due thereon, including the printing, interest and costs to date of sale, by publishing the same for three successive weeks immediately prior to the first Monday in May, 1883, in the official paper of said county, to-wit: the said paper being published in said City of New Tacoma in the manner provided by law.

XII.

That said delinquent list contained a notification that all real estate described thereon, on which the taxes for the preceeding year, to-wit: the year 1882, had not been paid, would be sold at public auction to satisfy the taxes, penalty, interest, costs and charges due to the city from the owners thereof for said year, at "New Tacoma,"

in front of the court house door of the County of Pierce and Territory of Washington; that said sale would commence on the first Monday of May, 1883, and continue until said real estate was sold, as required by law, which notice so published as aforesaid, contained a description of all the property to be sold, and the names of the persons to whom said property was assessed; and that the said delinquent list, so published as aforesaid, contained a description of the property described in plaintiff's complaint, assessed to the said Mary A. Givens.

XIII.

That in pursuance of said notice so published and given as aforesaid, the said sheriff did, on the 7th day of May, 1883, said day being the first Monday of May of the said year, 1883, offer the said tract of land described in plaintiff's complaint, for sale between the hours of 10 o'clock A. M., and 3 o'clock P. M. of said day, to pay said taxes and charges due thereon, at public auction in front of the court house door in said "New Tacoma," and that at said sale, D. B. Hannah, one of the defendants herein, was the bidder who was willing to take the least quantity, or the smallest portion of the interest in said land, and pay the taxes, costs and charges due thereon, including one dollar for certificate of sale, in all amounting to the sum of four dollars and seventy-eight cents ($4.78.)

XIV.

That at said sale the said D. B. Hannah purchased the said premises, and then and there paid the full amount of said taxes, costs and charges due thereon, and that thereupon the treasurer of said County of Pierce delivered to said D. B. Hannah the usual certificate of sale, and by virtue thereof the said D. B. Hannah became the purchaser of the land described in plaintiff's complaint so sold for taxes as aforesaid.

XV.

That on the 2d day of April, 1886, the said D. B. Hannah duly assigned the said certificate of sale, and all his rights thereunder, to one W. B. Kelly.

XVI.

That said premises were not redeemed by any person within the time limited by law, and that thereafter and on the 16th day of September, 1886, one Lewis Byrd, then being the sheriff of the County of Pierce, Territory of Washington, executed and delivered to the said W. B. Kelly, in the manner and form provided by law, a deed conveying to said W. B. Kelly, his heirs and assigns forever, all and singular the premises described in plaintiff's complaint.

XVII.

That said deed, so as aforesaid made, executed and delivered by said sheriff to said W. B. Kelly, was duly recorded in the office of the auditor of said Pierce county, Washington territory, on the 9th day of October, 1886, in volume nineteen of deeds, at pages 706, 707, 708.

XVIII.

That thereafter, and on the 1st day of March, 1887, said W. B. Kelly and Mary M. Kelly, his wife, conveyed to the defendant, Dolphus B. Hannah, by warranty deed, all and singular the premises described in plaintiff's complaint, since which time the defendants have been in the open, notorious and exclusive possession of said premises, and have made permanent improvements thereon, costing five thousand dollars.

And for a further answer and defense, and by way of bar to the maintenance of this action, defendants allege :

That plaintiff is barred of his right to maintain this action by the provisions of section twenty-nine hundred and thirty-nine of the Code of Washington Territory, of the year 1881, which said section provides that any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid on the land redeemed, as provided by law, shall be commenced within three years from the time of recording tax deed of sale.

Wherefore : Defendants pray judgment against plaintiff to be dismissed hence without day ; that plaintiff's action be dismissed, and that defendants do have and recover their costs and disbursements herein.

Judson & Sharpstein,
Attorneys for Defendants.

State of Washington, } ss.
County of Pierce. }

D. B. Hannah, being duly sworn, on oath says: That he is one of the defendants in the above action; that he has read the foregoing amended answer, and knows the contents thereof, and that he believes it to be true.

D. B. Hannah.

Subscribed and sworn to before me, this 8th day of February, 1892.

W. C. Sharpstein, *Notary Public.*

Filed February 9, 1892.

"Exhibit F."

State of Washington, } ss.
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing, which was filed for record in my office, at ..... o'clock ..... m., on the 9th day of September, 1874, and is recorded on page 552, vol. four, of records of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
Auditor Pierce County, Washington.

[*Seal.*] By A. A. Swope,
Deputy.

Certificate No. 1328.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas: Thomas Hood, of Pierce county, Washington territory, has deposited in the general land office of the United States, a certificate of the register of the land office at Olympia, whereby it appears that full payment has been

made by the said Thomas Hood, according to the provisions of the act of congress of the 24th of April, 1820, entitled, "An Act Making Further Provision for the Sale of the Public Lands," for the south half of the northwest quarter, of the northeast quarter of the southwest quarter, and the northeast quarter of the southwest quarter, of section five, in township twenty, north of range three east, in the district of lands subject to sale at Olympia, Washington territory, containing one hundred and sixty acres, according to the official plat of the survey of the said lands, returned to the general land office by the surveyor general, which said tract has been purchased by the said Thomas Hood.

Now, Know Ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Thomas Hood, and to his heirs and assigns, the said tract above described.

To Have and to Hold the same, together with all the rights, privileges and immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Thomas Hood, and to his heirs and assigns forever.

In Testimony Whereof, I, Ulysses S. Grant, president of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

Given under my hand at the City of Washington, the 20th day of August, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States, the ninety-fourth.

By the President,
U. S. Grant.

B. J. B. Bunill, *Secretary*
J. N. Grainger,
[*Seal.*] *Recorder of the General Land Office.*

Recorded vol. three, page 414.

"Exhibit G."

State of Washington, } ss.
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office, at ..... o'clock ..... M., on the 2d day of November, 1868, and is recorded on pages 358 and 359 volume two, of record of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
[*Seal.*] *Auditor Pierce County, Wash.*
By A. A. Swope, *Deputy.*

[*Stamp, 50c.*]

Know all Men by These Presents: That I, Thomas Hood, in consideration of five hundred dollars, to me paid by C. P. Ferry and L. C. Fuller, the receipt whereof is hereby acknowledged, do by these presents, give, grant, bargain, sell and convey unto the said C. P. Ferry and L. C. Fuller, that piece or parcel of land, being the south one-half of the northwest quarter and northeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section number five, in township number twenty, north of range number three east, containing one hundred and sixty acres, situate and lying in the County of Pierce, Washington territory.

To Have and to Hold the above granted premises with the privileges and appurtenances thereto belonging to the said C. P. Ferry and L. C. Fuller, their heirs and assigns to their own use and behoof forever. And I, the said Thomas Hood, for myself and my heirs, exectuors and administrators, do covenant with the said C. P. Ferry and L. C. Fuller, their heirs and assigns, that I am lawfully seized in fee of the aforesaid premises; that they are free from all incumbrances; that I have good right to sell and convey the same to the said Ferry and Fuller, as aforesaid; and that I will, and my heirs, executors and administrators

shall warrant and defend the same to the said Ferry and Fuller, their heirs and assigns forever, against the lawful claims and demands of all persons.

In Witness Whereof I, the said Thomas Hood, have hereunto set my hand and seal this 14th day of September, in the year of our Lord eighteen hundred and sixty-eight.

Thomas Hood. [*Seal.*]

Signed, sealed and delivered in presence of

Wm. S. B. Nicholson,
R. Wilcox.

United States of America, } *ss.*
District of Oregon. }

Be it remembered, that on this 14th day of September, A. D. 1868, personally came before me R. Wilcox, clerk of the District Court of the United States, for the District of Oregon, Thomas Hood, to me known to be the person who signed and executed the within deed and acknowledged to me that he executed the same freely and voluntarily for the purposes therein set forth.

In witness whereof, I have hereunto set my hand and the seal of said court, at Portland, this 14th day of September, A. D. 1868.

[*Seal.*] R. Wilcox, *Clerk.*

"Exhibit H."

State of Washington, } *ss.*
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing, which was filed for record in my office at .....o'clock ..... M., on the 7th day of December, 1868, and is recorded on pages 376 and 377, volume two of record of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
Auditor Pierce County, Washington.

[*Seal.*] By A. A. Swope, *Deputy.*

[*Stamp, $1.00.*]

Know all Men by These Presents: That L. C. Fuller and Annie L. Fuller, his wife, and C. P. Ferry and Annie P. Ferry, his wife, of the City of Portland, State of Oregon, in consideration of the sum of one thousand dollars paid by E. M. Burton, the receipt whereof is hereby acknowledged, do hereby convey, remise, release and forever quitclaim unto the said E. M. Burton, his heirs and assigns, all that lot, tract or parcel of land, situate in Pierce county, Washington territory, and bounded and described as follows, to-wit:

The northeast quarter of section number six (6), in township number two (2), north of range three (3) east, containing one hundred and sixty (160) acres, also one-third of a fraction consisting of thirteen (13) acres and fraction, entered at the same time as above described premises. Excepting and reserving out of the first above described real estate the following described premises, to-wit:

Commencing at the northeast corner of said tract; thence south seven hundred and fifty-two feet, six inches (752 feet, 6 inches); thence west seven hundred and fifty-two feet, six inches (752 feet, 6 inches); north seven hundred and fifty-two feet and six inches (752 feet, 6 inches); thence east seven hundred and fifty-two feet and six inches (752 feet, 6 inches) to the place of beginning, containing thirteen (13) acres, more or less.

Also the undivided one-third ($\frac{1}{3}$) of the following described premises, to-wit:

The south half of the northwest quarter, and the northeast quarter of the northwest quarter, and the northeast quarter of the southwest quarter of section number five, township number twenty, north of range number three east, containing one hundred and sixty acres more or less, situate and being in the County of Pierce, Washington territory, with all the buildings, improvements, privileges and appurtenances thereon being and thereunto belonging and appertaining.

To Have and to Hold, the above released premises to the said E. M. Burton, his heirs and assigns, to his own use and behoof forever. And the said parties of the first

part, for themselves and their heirs, executors and administrators, do covenant with the said E. M. Burton, his heirs and assigns, that the said above described premises are free from all incumbrances made or suffered by the said parties of the first part, and that they will and their heirs, executors and administrators shall warrant and defend the same to the said heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through or under them, but against none other.

In Witness Whereof, We, the said parties of the first part, have hereunto set our hands and seals this 23d day of November, A. D. 1868.

L. C. Fuller, [*Seal.*]
Annie L. Fuller, [*Seal.*]
C. P. Ferry. [*Seal.*]
Annie P. Ferry, [*Seal.*]

Signed, sealed and delivered in presence of
D. W. Williams,
Wm. T. B. Nicholson.

State of Oregon, }
Multnomah County. } *ss.*

On this 23d day of November, A. D. 1868, before me, D. W. Williams, commissioner for the Territory of Washington, duly sworn, appointed and commissioned by the governor of the Territory of Washington, to take the acknowledgment and proof of the execution of deeds or any other instrument of writing under seal, or otherwise, to be used or recorded in said Washington territory, personally appeared L. C. Fuller and Annie L., his wife, and C. P. Ferry and Annie P. Ferry, his wife, each known to me to be the individuals described in and who executed the annexed instrument as parties thereto, and acknowledged to me that they and each of them executed the same freely and voluntarily and for the uses and purposes therein mentioned.

And the said Annie L., wife of the said L. C. Fuller, and Annie P., wife of the said C. P. Ferry, each having first by me been made acquainted with the contents of said instrument hereto annexed, acknowledged to me, on examination separate and apart from and without the hearing of

her said husband, that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned, without fear or compulsion, or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[*Seal.*] D. W. Williams,

Commissioner of Deeds for the Territory of Washington. Residing at Portland, Oregon.

"Exhibit I."

State of Washington, } ss.
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office, at ..... o'clock .... m., on the 22d day of March, 1869, and is recorded on page 418, Vol. two of record of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
Auditor of Pierce County, Wash.

[*Seal.*] By A. A. Swope, *Deputy.*

[*Stamp, $1.00.*]

This Indenture, made the 15th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, between E. M. Burton and Rhoda Ann Burton, his wife, of the first part, and L. C. Fuller and C. P. Ferry, of the second part :

Witnesseth, That the said party of the first part, for and in consideration of the sum of one thousand dollars, in lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised,

released and forever quitclaimed, and by these presents do remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns, all the certain lot and pieces or parcels of land, situated, lying and being in Pierce county, Washington territory, and bounded and particularly described as follows, to-wit:

The northeast quarter of section number six (6), in township number two, north of range number three east, containing one hundred and sixty (160) acres; also a fraction consisting of thirteen acres entered at the same time as the above described premises, also the undivided one-third ($\frac{1}{3}$), of the following described premises, to-wit:

The south half of the northwest quarter and the northeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section number five, township number twenty, north of range number three east, containing one hundred and sixty acres more or less, situated and lying in the County of Pierce, Washington territory, with all buildings and other improvements whatsoever. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession and demand whatsoever, as well in law as in equity of the said parties of the first part of, in order to the said premises, and every part and parcel thereof with the appurtenances.

To Have and to Hold, all and singular, the said premises, together with the appurtenances unto the said parties of the second part, their heirs and assigns forever.

In Witness Whereof, the said party of the first part has hereunto set their hands and seals the day and year first above written.

E. M. Burton, [*Seal.*]
Rhoda Ann Burton, [*Seal.*]

Signed, sealed and delivered in the presence of

Helen M. Burton,
D. W. Williams.

State of Oregon, } ss.
Multnomah County. }

On this 15th day of March, A. D. 1869, before me, D. W. Williams, commissioner for the Territory of Washington, duly sworn, appointed and commissioned by the governor of the said territory to take the acknowledgment and proof of the execution of deeds, or any other instrument of writing, under seal or otherwise, to be used or recorded in said Washington territory, personally appeared E. M. Burton and Rhoda Ann, his wife, known to me to be the individuals described in, and who executed the annexed instrument as parties thereto, and acknowledged to me that they and each of them executed the same freely and voluntarily for the uses and purposes therein mentioned.

And the said Rhoda Ann Burton, wife of the said E. M. Burton, having first by me been made acquainted with the contents of said instrument, hereto annexed, acknowledged to me, on examination separate and apart from, and without the hearing of her said husband, that she executed the same freely and voluntarily for the uses and purposes therein mentioned, without fear or compulsion or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[*Seal.*] D. W. Williams,

Commissioner of Deeds for the Territory of Washington, Residing at Portland, Oregon.

"Exhibit J."

State of Washington, } ss.
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office, at ..... o'clock ....m.,

on the 14th day of April, 1870, and is recorded on pages 588 and 589 Vol. two of record of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
Auditor Pierce County, Wash.
[*Seal.*] By A. A. Swope, *Deputy.*

[*Stamp, $1.00.*]

This Indenture, Entered into this 8th day of February, 1870, between Lewis C. Fuller and Annie L. Fuller, his wife, and Clinton P. Ferry and Annie P. Ferry, his wife, parties of the first part, and the Workingmens' Joint Stock Association, of Portland, Oregon, a corporation duly incorporated under the laws of Oregon, party of the second part:

Witnesseth, that the said parties of the first part, in consideration of six hundred dollars coin, to them paid by the party of the second part, have granted, bargained, sold, conveyed and confirmed, and by these do grant, bargain, sell, convey and confirm unto the said party of the second part, its successors and assigns, all those pieces or parcels of land situate in the County of Pierce and Territory of Washington, known and described on the maps and plats of the United States surveys as the southwest quarter of the northwest quarter of section five (5), and the west half of the southeast quarter of the northwest quarter of section five (5), in township twenty (20), north range three east, containing sixty acres, together with all and singular the tenements and appurtenances.

To Have and to Hold, the said described and conveyed premises unto the said Workingmens' Joint Stock Association, its successors and assigns, forever. And the said parties of the first part, for themselves and their heirs, covenant to and with the said party of the second part, its successors and assigns, that they will, and their heirs, executors and administrators shall warrant and defend the said described and herein conveyed premises unto the said party of the second part, its successors and assigns, against the claims of all persons whomsoever (the United States only excepted) forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the date first above written.

L. C. Fuller, [*Seal.*]
Annie L. Fuller, [*Seal.*]
In presence of C. P. Ferry, [*Seal.*]
J. J. Murphy, Annie P. Ferry. [*Seal.*]
D. W. Williams.

State of Oregon, }
Multnomah County. } *ss.*

On this 8th day of February, A. D. 1870, before me, D.W. Williams, commissioner for the Territory of Washington, duly sworn, appointed and commissioned by the governor of the Territory of Washington, to take the acknowledgment and proof of the execution of deeds or any other instrument of writing, under seal or otherwise, to be used or recorded in said Washington territory, personally appeared before me, Lewis C. Fuller and Annie L. Fuller, his wife, and Clinton P. Ferry and Annie P. Ferry, his wife, all personally known to me to be the individuals described in and who executed the annexed instrument as parties thereto, and acknowledged to me that they and each of them executed the same freely and voluntarily for the uses and purposes therein mentioned.

And the said Annie L. Fuller, wife of the said L. C. Fuller, and Annie P. Ferry, wife of C. P. Ferry, having first by me been made acquainted with the contents of said instrument hereto annexed, acknowledged to me each on examination separate and apart from and without the hearing of her said husband, that she executed the same freely and voluntarily, for the uses and purposes therein mentioned, without fear or compulsion or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[*Seal.*] D. W. Williams,

Commissioner of Deeds for the Territory of Washington, Residing at Portland, Oregon.

"Exhibit K."

State of Washington, } ss.
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office, at nine o'clock A. M., on the 6th day of March, 1871, and is recorded on pages ninety-eight and ninety-nine, volume three of record of deeds as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
Auditor Pierce County, Wash.

[*Seal.*] By A. A. Swope,
Deputy.

[*Stamps, 50c.*]

This Indenture, Made and entered into this 10th day of February, A. D. 1871, between Lewis C. Fuller and Anna L. Fuller, his wife, Clinton P. Ferry and Anna P. Ferry, his wife, and the Workingmens' Joint Stock Association, of Portland, Oregon, a corporation duly incorporated under the laws of Oregon, parties of the first part, and George P. Riley, William Brown, John Huntington, John Donaldson, Edward S. Simmons, Charles Gilbert, George Laviney, George Thomas, James H. Givens, Charles Howard, Mary H. Carr, Anna Rodney, George Washington, Philip Francis, parties of the second part.

Witnesseth: That the said parties of the first part, for and in consideration of the sum of six hundred dollars ($600.00) gold coin of the United States, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed, and by these presents do remise, release and quitclaim forever unto the said parties of the second part, their heirs and assigns. All these certain pieces or parcels of land, situate and lying and being in Pierce county, Washington territory, United States of America, bounded and

described and known on the maps and plats of the United States survey in and for the said county and territory as follows, to-wit:

The southwest one-quarter ($\frac{1}{4}$) of the northwest one-quarter ($\frac{1}{4}$) of section five (5), and the west one-half of the southeast one-quarter ($\frac{1}{4}$) of the northwest one-quarter ($\frac{1}{4}$) of section five (5), township twenty (20), north range three east, containing sixty (60) acres, together with all and singular the tenements, heriditaments and appurtenances thereunto belonging or appertaining.

To Have and to Hold, The same to themeselves, their heirs and assigns, in manner following: To William Brown, thirty-nine four-hundred-and-sixty-fourths (39-464); to George Laviney, sixty-five four-hundred-and-sixty-fourths (65-464); to George P. Riley, John Huntington, John Donaldson, Edward S. Simmons, Charles Gilbert, George Thomas, James H. Givens, Charles Howard, Mary H. Carr, Anna Rodney, George Washington and Philip Francis, thirty four-hundred-and-sixty-fourths (30-464) each.

In Witness Whereof, The parties of the first part, Lewis C. Fuller and Anna F. Fuller, his wife, Clinton P. Ferry and Anna P. Ferry, his wife, and the Workingmens' Joint Stock Association, of Portland, have hereunto set their hands and seals, and the Workingmens' Joint Stock Association have caused their president and secretary's signature to be subcribed, and the seal of the association to be affixed hereto, the day and year first above written.

L. C. Fuller, [*Seal.*]
Annie L. Fuller, [*Seal.*]
C. P. Ferry, [*Seal.*]
Annie P. Ferry, [*Seal.*]

Geo. P. Riley. [*L. S.*]
President of Workingmens' Joint Stock Association.

[*Seal.*] Edward S. Simmons, [*L. S.*]
Secretary of Workingmens' Joint Stock Association.

Signed, sealed and delivered in presence of

D. Smolerman,
C. A. Dolph.

State of Oregon, } ss.
Multnomah County. }

On this 20th day of February, A. D. 1871, before me personally came L. C. Fuller and Anna L. Fuller, his wife, Clinton P. Ferry and Anna P. Ferry, his wife, Geo. P. Riley, president of the Workingmens' Joint Stock Association, and Edward S. Simmons, secretary of the said Workingmens' Joint Stock Association, who are all to me personally known to be the identical persons who are described in and who executed the forgoing indenture, and acknowledged to me that they had executed the same.

And said Geo. P. Riley and said Edward S. Simmons acknowledged to me that they executed the same as president and secretary of the Workingmens' Joint Stock Association, respectively, and said Anna L. Fuller, wife of said L. C. Fuller, and said Anna P. Ferry, wife of said Clinton P. Ferry, on an examination by me, made separate and apart from their said husbands, acknowledged to me that they executed the same freely and voluntarily, without any fear, compulsion or coercion from any person whomsoever.

In Testimony Whereof, I have hereunto set my hand and seal this, the day in this certificate above written.

C. A. Dolph,

[*Seal.*] *Notary Public for the State of Oregon.*

"Exhibit L."

State of Washington, } ss.
County of Pierce, }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office, at ..... o'clock .... m., on the 11th day of December, 1871, and is recorded on page sixty-three and sixty four, Vol. one, of record of power of attorney, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 13th day of July, 1892.

W. H. Hollis,
Auditor Pierce County, Wash.

[*Seal.*] By A. A. Swope,
Deputy.

[*Stamp $1.00 Dollar, Cancelled.*]

KNOW ALL MEN BY THESE PRESENTS: That we, George P. Riley, William Brown, John Huntington, John Donaldson, Edward S. Simmons, Charles Gilbert, George Luviney, George Thomas, James H. Givens, Charles Howard, Mary H. Carr, Anna Rodney, George Washington and Philip Francis, of Portland, Oregon, have made, constituted and appointed, and by these presents do make, constitute and appoint John W. Matthews, of said city and state, our true and lawful attorney, for us and in our names, place and stead, to grant, bargain, sell, convey, alien, remise, release, quitclaim, assign or transfer all such lands for such sum or price, and on such terms as to him shall seem meet, said lands being more particularly known as a certain tract described as follows, to-wit:

The southwest one-quarter ($\frac{1}{4}$) of the northwest one-quarter, of section five (5), and the west one-half ($\frac{1}{2}$) of the southeast one-quarter ($\frac{1}{4}$), of the northwest one-quarter ($\frac{1}{4}$), of section five (5), township twenty (20), north range three (3) east, containing sixty (60) acres; also a block of land commencing at a stake (80) feet north of the northwest corner of block number twenty-one (21), in Hanford's addition to South Seattle, W. T.; running thence north two hundred and forty feet (240); thence east two hundred and fifty-six (256) feet; thence south two hundred and forty (240) feet; thence west two hundred and fifty-six feet to the place of beginning.

Also a tract of land commencing at a stake located eighty (80) rods north of a point on the south line of E. Hanford's donation claim, which point is one hundred and sixty (160) rods east of the southwest corner of said claim; running thence north twenty rods; thence east eighty (80) rods; thence south twenty (20) rods and thence west eighty rods to the place of beginning, containing ten (10) acres.

Also a tract commencing 295.15 feet west from the northeast corner of the northeast quarter of section six, township twenty, north range three east, being the northwest corner of a tract of land owned by Connell and Clements; thence west 162 18-100 feet to the northeast corner of tract of land belonging to Joseph Buchtel; thence south along the east line of said tract 295.16 feet to the southeast corner of said tract; thence west along the south line of said tract

295.16 feet to the southwest corner of said tract; thence south 225.75 feet; thence east 752.5 feet; thence north 225.75 feet to the southeast corner of said tract of land belonging to Connell and Clements; thence west along the south line of said tract 295.16 feet to the southwest corner of said tract; thence north to the place of beginning, containing five (5) acres, and being in Pierce county, W. T.

And for all the powers aforesaid, for us, and in our names to make, execute, acknowledge and deliver all necessary deeds, with or without seal.

In Witness Whereof, we have hereunto set our hands and seals this 5th day of September, A. D. 1871.

George Putnam Riley, [*Seal.*]
William Brown, [*Seal.*]
John Huntington, [*Seal.*]
John Donaldson, [*Seal.*]
Ed. S. Simmons,
By A. S. Gross, *Attorney.* [*Seal.*]
His
Charles x Gilbert, [*Seal.*]
Mark.
George Luviney, [*Seal*]
George Thomas,
By Geo. P. Riley, *proxy,* [*Seal.*]
His
James H. x Givens, [*Seal.*]
Mark.
His
Charles x Howard [*Seal.*]
Mark.
Mary H. Carr, [*Seal.*]
His
George x Washington, [*Seal*]
Mark.
Anna Rodney,
His
Per Chas. x Howard, *Her proxy,* [*Seal.*]
Mark.
Philip Francis. [*Seal.*]

Signed, sealed and delivered in presence of

A. S. Gross,
Gilbert Rosenstork.

State of Oregon, }
County of Multnomah, } *ss.*

This Certifies, That on this the 5th day of September, 1871, before me, the undersigned, personally appeared the within named George P. Riley, Wm. Brown, John Huntington, John Donaldson, Ed. S. Simmons, by his attorney, A. S. Gross, Charles Gilbert, George Luviney, George Thomas by his proxy, Geo. P. Riley, Jas. H. Givens, Chas. Howard, Mary H. Carr, George Washington, Anna Rodney per Chas. Howard her proxy, and Philip Francis, who are known to me to be the persons described in and who executed the within instrument, and acknowledged to me that they executed the same for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and official seal the day and year last above written.

[*Seal.*] A. S. Gross,
Commissioner of Deeds for Wash. Territory.

"Exhibit M."

State of Washington, }
County of Pierce. } *ss.*

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office, at twelve o'clock....m., on the 22d day of March, 1873, and is recorded on page 699, volume three of record of deeds as the same now appears from the record thereof in my office.

Witness my hand and official seal this 7th day of September, 1892.

W. H. Hollis,
[*Seal.*] *Auditor for Pierce County, Wash.*
By A. A. Swope,
Deputy.

John W. Matthews to Mary A. Givens.

Know all Men by These Presents, That we, George P. Riley, Charles Gilbert, Philip Francis, George Luviney, John Donaldson, George Washington, Charles Howard,

George Thomas, Edward S. Simmons, Mary H. Carr, William Brown, John Huntington and Anna Rodney, by their attorney-in-fact, John W. Matthews, in consideration of one dollar to us paid by Mary A. Givens, do hereby remise, release and forever quitclaim unto the said Mary A. Givens and unto her heirs and assigns, the following described real estate :

All of lots numbered one, two, three, four, five, six and seven in block numbered sixty-four (64), Riley's Addition to Riley Addition to South Seattle, Washington territory. Also lots numbered two and three in water block lettered "A," as per plats of said addition on file in King county, of said territory. Also a certain piece of real estate described as follows, to-wit : Beginning at a point $53.33\frac{1}{3}$ chains north and six chains east of the southwest corner of section five, township twenty, north of range three east; thence east six chains ; thence north $6.66\frac{2}{3}$ chains ; thence west six chains ; thence south $6.66\frac{2}{3}$ chains to place of beginning, containing four (4) acres. Also one parcel of land beginning at a point 4.47 chains south and 5.70 chains west of the northeast corner of section six, township twenty, north range three east ; thence south 1.71 chains ; thence west 1.90 chains ; thence north 1.71 chains ; thence east 1.90 chains to place of beginning, containing one-third of an acre ($\frac{1}{3}$), all being in (*i. e.*, the last two described parcels of land) Pierce county, Washington territory.

GEORGE P. RILEY,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

CHARLES GILBERT,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

PHILIP FRANCIS,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

GEORGE LUVINEY,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

JOHN HUNTINGTON,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

JOHN DONALDSON,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

GEORGE WASHINGTON,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

CHARLES HOWARD,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

GEORGE THOMAS,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

ANNA RODNEY,
By JOHN W. MATTHEWS,
Her Attorney-in-Fact. [*Seal.*]

EDWARD S. SIMMONS,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

MARY A. CARR,
By JOHN W. MATTHEWS,
Her Attorney-in-Fact. [*Seal.*]

WILLIAM BROWN,
By JOHN W. MATTHEWS,
His Attorney-in-Fact. [*Seal.*]

Signed, sealed and delivered in presence of
J. E. EVANS,
A. S. GROSS.

State of Oregon,
County of Multnomah. } *ss.*

BE IT REMEMBERED, That on this 15th day of March, A. D. 1873, before the undersigned, a commissioner of deeds of the Territory of Washington, for the State of Oregon, duly commissioned, sworn and acting, residing in the City of Portland, Oregon, personally appeared the above named John W. Matthews, to me known to be the attorney-in-fact for George P. Riley, Charles Gilbert, Philip Francis, George Luviney, John Donaldson, George Washington, Charles Howard, George Thomas, Edward S. Simmons, Mary A. Carr, William Brown, John Huntington and Anna Rodney, the person described in, and who as attorney-in-fact

for the said George P. Riley, Charles Gilbert, Philip Francis, George Luviney, John Donaldson, George Washington, Charles Howard, George Thomas, Edward S. Simmons, Mary A. Carr, William Brown, John Huntington and Anna Rodney, executed the foregoing deed, and acknowledged that he executed said deed as such attorney-in-fact, freely as the act and deed of his said principals for the purposes therein specified.

In Testimony Whereof, I have hereunto set my hand and affixed my seal of office the day and year last above written.

A. S. Gross,
[*Seal.*] *Commissioner of Deeds for Washington Territory.*

"Exhibit N."

State of Washington, } *ss.*
County of Pierce. }

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office at 1:15 o'clock p. m., on the 9th day of October, 1886, and is recorded on pages 706-708, volume nineteen of record of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 9th day of February, 1892.

W. H. Hollis,
Auditor Pierce County, Wash.
By H. H. Swope,
Deputy.
[*County Auditor Seal Pierce County, Washington.*]

This Indenture, Made this 17th day of September, A. D. 1886, between the Territory of Washington, by Lewis Byrd, sheriff of Pierce county, in said Territory of Washington, party of the first part, and W. P. Kelly, party of the second part, Witnesseth, that Whereas, under the provisions of subdivision one of section thirty-four of the city charter of New Tacoma, Pierce county, Washington territory, approved November 5, 1881, the city government of

said city had power and was authorized to assess, levy and to collect taxes for general municipal purposes on all property by law taxable for territorial purposes, and

WHEREAS, Said city government did cause a tax to be levied upon the real estate hereinafter described for municipal purposes in the year 1882, as by said section thirty-four provided, and

WHEREAS: Under the provisions of section sixty-three, of said city charter of New Tacoma, provisions are made for the collection of delinquent taxes, as in the manner provided for the collection of delinquent territorial and county taxes, by the laws of Washington territory, and

WHEREAS: Section twenty-nine hundred and three of chapter twenty-five of the Code of Washington for the year 1881, provides that delinquent taxes shall be collected by the sheriff of the county by distraint and sale of property, and

WHEREAS: The city council of said city caused the clerk of said city to deliver to the tax collector of said city of New Tacoma, the tax roll of 1882, and caused to be attached thereto a warrant directed to the sheriff of said Pierce county, authorizing the said sheriff of Pierce county to collect said delinquent taxes as provided by law, all of which is fully provided for and in accordance with provisions of said section sixty-three of the said city charter, and

WHEREAS: It is made the duty of the clerk of said city to deliver to the sheriff of the said county, or collector of delinquent taxes, the duplicate assessment roll for the collection of all delinquent taxes of said year, and

WHEREAS: The clerk of the City of New Tacoma, Washington territory, did, on the 23d day of January, A. D. 1883, deliver to the sheriff of Pierce county the duplicate city assessment roll, containing the list of all persons and property, then owing taxes in said city and to said city of New Tacoma, together with costs and charges due thereon, which said duplicate city assessment roll did there include the property herein described, the same being then assessed for the year ending on the 31st day of December, 1882, for city municipal taxes to one Mary A. Givens.

That on the 2d day of April, A. D. 1883, the said sheriff of Pierce county, entered in the said duplicate assessment roll, immediately following his supplemental assessment, the affidavit required under section twenty-nine hundred and fifteen of the Code of Washington territory, to the effect that after due and diligent search, no personal property could be found to pay the taxes assessed against the persons and property there described on said duplicate assessment roll remaining unpaid, and that the taxes due from the said Mary A. Givens assessed on the land herein described, had not been paid and that the same then and there appeared on said duplicate assessment roll as delinquent and wholly unpaid, and that the said taxes due from said Mary A. Givens, as aforesaid, assessed on said land, were then delinquent and unpaid, and that no personal property could be found belonging to said Mary A. Givens. That under the provisions of section twenty-nine hundred and sixteen of the Code of Washington territory, the said sheriff gave public notice of the sale of the real property described in said delinquent list, for the total amount of taxes then due thereon including printing, interest and costs to date of sale by publishing for three successive weeks immediately preceding the first Monday in May, A. D. 1883, the said delinquent tax list in the..... , a newspaper published weekly at New Tacoma, in the said County of Pierce, and being the official paper of said County of Pierce. That said delinquent list contained a notification that all real estate described therein upon which the taxes for the preceding year, the year A. D. 1882, had not been paid, would be sold at public auction to satisfy all taxes, penalties, interest, and costs due the territory and the said county from the owners thereof for said year at New Tacoma, in front of the court house door in said county and territory, that said sale would commence on the said first Monday of May and continue until the said real estate was sold as required by law, which said notice so published as aforesaid, contained a description of all the property to be sold and the names of the persons to whom said property was assessed. That the said delinquent list so published as aforesaid, contained the description of the property assessed to said Mary A. Givens, which said property was described thereon as follows:

Commencing sixty (60) chains north and six (6) chains east of the southwest corner of section five (5), in township twenty (20), north of range three (3) east of the Willamette meridian; thence running east six (6) chains; thence south six and two-thirds ($6\frac{2}{3}$) chains; thence west six (6) chains; thence north six and two-thirds ($6\frac{2}{3}$) chains to the place of beginning, and containing four (4) acres in Pierce county, Washington territory. The taxes then due thereon amounted to four and 78-100 dollars ($4.78) including interest and costs.

That in pursuance of said notice so published and given as aforesaid, the said sheriff on the 7th day of May, A. D. 1883, offered the aforesaid tract of land for sale between the hours of ten o'clock A. M. and three o'clock P. M. of that day, to pay said taxes and charges due thereon, at public auction in front of the court house door at said New Tacoma, that at said sale D. B. Hannah was the bidder who was willing to take the least quantity of, or smallest portion of the interest in said land and pay said taxes, costs, charges due thereon, including one dollar for the certificate of sale which amounted to the sum of four and 78-100 dollars and ..... cents. That the least quantity of, or smallest portion of the interest in said land lying and being in said Pierce county and Territory of Washington, is as heretofore described, which was struck off to the said D. B. Hannah who paid the full amount of said taxes, costs and charges and become the purchaser of the said above described tract of land so sold for said taxes as aforesaid. That the said tract of land so sold was sold subject to redemption pursuant to the statutes as therein provided. And, whereas no person has redeemed the aforesaid described property during the time allowed by law for its redemption, and as stated in the certificate of sale thereof. And, whereas the said D. B. Hannah did on the 2d day of April, A. D. 1886, duly assign, sell and transfer his certificate of sale, and all his right thereunder unto the said party of the second part, as appears from said certificate of sale and assignment thereof. Now, therefore, this indenture witnesseth for and in consideration of the sum of four dollars and seventy-eight cents, to the said sheriff paid at the time of making said sale, the receipt whereof is acknowledged in said certificate of sale, I, Lewis Byrd, sheriff of said Pierce county, Washington territory,

by virtue and in pursuance of the statutes in such cases made and provided, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the aforesaid W. B. Kelly, and to his heirs and assigns forever, all that tract, piece or parcel of land so sold and hereinbefore and lastly described in this deed as fully and absolutely as I, Lewis Byrd, sheriff as aforesaid, may or can lawfully sell and convey the same, together with all and singular the tenements and appurtenances thereunto belonging, or in anywise appertaining to the said Mary A. Givens, and of all owner claimants thereof known and unknown in and to said last described premises, and every part and parcel thereof, with the appurtenances which she, he or they, or either of them, had or possessed when the said assessment or levy was made, to have and to hold all and singular the hereinbefore and last mentioned and described premises together with the appurtenances thereof unto the said W. B. Kelly, the said party of the second part, his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal the day and year first hereinbefore written.

TERRITORY OF WASHINGTON,
By LEWIS BYRD, [*Seal.*]
Sheriff of Pierce County.

Signed, sealed and delivered in the presence of
L. G. SHELTON,
G. M. GRANGER.

"DEFENDANT'S EXHIBIT I, C. B. E."

Territory of Washington, } *ss.*
County of Pierce. }

This certifies, that on this 22d day of September, in the year of our Lord one thousand, eight hundred and eighty-six, before me, a notary public in and for Pierce county, Washington territory, personally appeared the within named Lewis Byrd, known to me to be the sheriff of Pierce county, Washington territory, whose name is subscribed to the foregoing deed, is personally known to me to be the individual described therein, and who executed the within deed

for the Territory of Washington, and acknowledged the same to be his free act and deed, and act and deed of the Territory of Washington for the uses and purposes therein specified.

In witness hereof I have hereunto set my hand and seal the day and year in this certificate first above written.

[*Seal.*] A. A. Lowe,
Notary Public.

"Exhibit O."

State of Washington, }
County of Pierce. } *ss.*

I, W. H. Hollis, auditor in and for said county, hereby certify that the within and foregoing instrument of writing is a full, true and correct copy of an instrument in writing which was filed for record in my office at 3:15 o'clock P. M., on the 7th day of March, 1887, and is recorded on page 479, Vol. twenty of record of deeds, as the same now appears from the record thereof in my office.

Witness my hand and official seal this 9th day of February, 1892.

W. H. Hollis,
Auditor Pierce County.

[*County Auditor Seal.*] By A. A. Swope,
Deputy.

This indenture witnesseth, that William B. Kelly and Mary M. Kelly, his wife, of Pierce county, Washington territory, parties of the first part, for and in consideration of the sum of one thousand dollars in gold coin of the United States of America, to them in hand paid by Dolphus B. Hannah, of the same place, the party of the second part, have granted, bargained and sold, and by these presents do grant, bargain and sell and convey all our right, title and interest unto the said party of the second part, and to his heirs and assigns, the following described premises, situate, lying and being in the County of Pierce, Territory of Washington, to-wit: Commencing sixty (60) chains north and six (6) chains east of the southwest corner of section five (5), township twenty (20), north of range three (3) east, and running thence east six (6) chains; thence south six and

two-thirds ($6\frac{2}{3}$) chains, thence west six (6) chains, and thence north six and two-thirds ($6\frac{2}{3}$) chains to the place of beginning, containing four (4) acres, more or less.

To have and to hold the said premises, with their appurtenances, unto the said party of the second part, his heirs and assigns forever, and we, the said parties of the first part do hereby covenant to and with the said party of the second part, his heirs and assigns, that we are the owners of said premises, that they are free from all incumbrances, and that we will warrant and defend the same from all lawful claims whatsoever of the said parties of the first part, and them only.

Witness our hands and seals the 1st day of March, A. D. one thousand, eight hundred and eighty-seven.

WILLIAM B. KELLY, [*Seal.*]
Witnesses : MARY M. KELLY. [*Seal.*]
JAMES WICKERSHAM,
FRANK H. GLOYD.

"DEFENDANTS' EXHIBIT 2, C. B. E."

Territory of Washington, } *ss.*
County of Pierce. }

This certifies, that on the 1st day of March, in the year of our Lord one thousand eight hundred and eighty-seven, before me, a probate judge in and for Pierce county, Washington territory, personally appeared the within named William B. Kelly and Mary M. Kelly, whose names are subscribed to the foregoing instrument as parties thereto, personally known to me to be the individuals described in and who executed the within deed, and acknowledged the same to be their free act and deed, and I do further certify that I made known to Mary M. Kelly, wife of said William B. Kelly, the contents of the foregoing instrument and fully appraised her of her rights under the exemption and homestead laws of Washington territory, and of the effect of her signing said deed, and that I examined her separate and apart from her husband, without his hearing, and that upon said separate examination she signed said deed and acknowledged that she voluntarily of her own free will, andwithout fear of or coercion from her husband, signed and executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[*Seal.*] JAMES WICKERSHAM.

Probate Judge in and for Pierce County, Washington Territory.

"EXHIBIT P."

ORDINANCE No. 58.

To Prescribe the Time and Manner of Making the Annual Assessment Roll of Taxable Property of the City of New Tacoma.

The common council of New Tacoma does ordain as follows:

Section 1. The time for making the annual assessment of taxable property within the City of New Tacoma for the year eighteen hundred and eighty-two, shall begin on the 31st day of May and shall end on the 15th day of July of said year.

Section 2. The assessment shall be made in the manner prescribed by law for assessing property for territorial and county purposes.

Section 3. The assessor shall make due returns of his assessment roll to the city clerk on or before the 25th day of July of said year.

Section 4. The common council shall meet on the 31st day of July of said year, at 7:30 o'clock P. M., and sit as a board of equalization for the purpose of revising the assessment returns, and may adjourn from time to time until the revision of the assessment roll is completed.

Section 5. The common council sitting as a board of equalization, shall hear and determine any cases that may be brought before it by persons who shall apply in writing to have their assessments revized, either in the listing or valuation of their property, and may also order the assessment of any property, real or personal, to be raised, if, in their judgment, the assessment is too low. Provided that no assessments shall be raised until citation has been

issued by the clerk, upon the order of the board, directing the person to whom the property is assessed to appear before the board within one day from the date of such citation, to show cause why the said assessment shall not be raised. Provided, further, that when application has been made to the board by any one to have his assessment revised, as provided in the first part of this section, the board may increase his assessment without first issuing a citation.

Section 6. When the common council, sitting as a board of equalization, shall complete the revision of the assessment roll, it shall be the duty of the city clerk to make a fair copy of the assessment roll, as revised, in a book provided for the purpose.

Section 7. Before the meeting of the common council as a board of equalization, the city clerk shall cause notice to be given by publication in a newspaper published and in general circulation in the city, stating the time and place of such meeting, the object thereof, and notifying all persons interested to appear before it.

Section 8. The provisions of this ordinance shall apply to the assessment of taxable property for the years after 1882, except that the dates shall be changed as follows: The time for beginning shall be the 1st day of April and the time for closing the same shall be the 10th day of May, and the assessment roll shall be turned over to the city clerk by the 20th day of May of each year. The common council shall sit as a board of equalization on the 30th day of May of each year.

Section 9. Ordinance No. 50 entitled: An Ordinance Concerning the Annual Assessment of the Taxable Property of the City of "New Tacoma," passed May 22d, 1882, is hereby repealed.

Passed and approved June 23, 1882.

Attest: THEO. HOSMER, *Mayor.*

J. H. WILT, *City Clerk.*

I, George Haskin, do hereby certify that I am the city clerk of the City of Tacoma, Pierce county, Washington, and as such, am the custodian of the books containing the ordinances of the late City of "New Tacoma." That the

foregoing is a full, true and correct copy of Ordinance No. 58, of said City of New Tacoma, as shown upon the records of said city.

Witness my hand and the seal of said City of Tacoma, this 17th day of February, 1892.

GEO. HASKIN,
[*Seal.*] *City Clerk.*

"EXHIBIT Q."

ORDINANCE No. 90.

An Ordinance Levying the Annual Tax for General Municipal Purposes, for the Year, A. D. 1882.

The common council of New Tacoma, does ordain as follows:

SECTION 1. That there is hereby levied on all taxable property, both real, personal and mixed, of the City of New Tacoma, Pierce county, Washington territory, the sum of one-half of one per cent., according to the assessed value thereof as set forth in the assessment roll for the year, A. D. 1882, said tax being the regular annual tax for general municipal purposes, for the year, A. D. 1882.

2. That said tax shall be due and payable to the city treasurer on or before the 31st day of December, A. D. 1882, after which date said tax shall become delinquent.

3. That it shall be the duty of the city clerk, on or before the 1st day of November, 1882, to prepare the annual tax list in accordance with the levy, and deliver the same to the treasurer.

4. That it shall be the duty of the city treasurer, immediately after receiving said tax list from the clerk, to give notice of the same by publication in some newspaper, printed and published in the city, stating in said notice the time said tax will become delinquent.

Passed and approved October 24th, A. D. 1882.

A. S. ABERNETHY, JR.,
Attest: *Mayor.*
J. H. WILT, *Clerk.*

I, George Haskin, do hereby certify that I am the city clerk of the City of Tacoma, Pierce county, Washington, and as such am the custodian of the books containing the ordinances of the late City of "New Tacoma;" that the foregoing is a full, true and correct copy of Ordinance No. 70 of said City of New Tacoma, as shown upon the records of said city.

Witness my hand and the seal of said City of Tacoma, this 17th day of February, A. D. 1892.

GEO. HASKIN, *City Clerk.* [*Seal.*]

"EXHIBIT R."

SHERIFF'S NOTICE OF DELINQUENT TAX SALE.

Under and by virtue of an act of the legislative assembly of the Territory of Washington, approved November 5, A. D. 1881, I will sell at public auction, to the highest bidder for cash, at the court house door in the City of New Tacoma, for delinquent city taxes for the year 1882, the real estate described in the following list, unless the same shall be redeemed by the persons to whom said real estate is assessed, or their agents.

The sale will commence on Monday, May 7, A. D. 1883, at 10 o'clock A. M., and continue from day to day between the hours of 10 A. M. and 5 P. M., until such real estate shall have been sold or twice offered for sale.

HENRY WINSOR,
Sheriff of Pierce County, Washington Territory.

By L. G. SHELTON,
Deputy Sheriff.

Date of first publication, New Tacoma, April 20, 1883.

Givens, Mary A.—Commencing sixty chains north and six chains east of the northwest corner of section five, township twenty, north range three east of Willamette meridian; thence running east six chains; thence south $6\frac{2}{3}$ chains; thence west six chains; thence north $6\frac{2}{3}$ chains to the place of beginning, four acres..... $4.78

District of Washington, } ss.
Western Division. }

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Ninth Judicial District of Washington, do hereby certify the foregoing to be a full, true and correct copy of the heading of the advertisement referred to in the said newspaper, in evidence in the said case, and the description referred to, and that the same is the only property in said advertisement purporting to be the property of Mary A. Givens.

Attest my hand and the seal of said circuit court, this 7th day of September, A. D. 1892.

[*Seal.*] A. Reeves Ayres, *Clerk.*

"Exhibit S."

Original Assessment Roll of New Tacoma.

Name.	Description of Lands.	Lot or Section.
Givens, Mary A.	Commencing 60 chains north and 6 chains east of the N. W. corner of Sec. 5, T. 20, N. R. E. of W. M., thence running E. 6 chains, thence S $6\frac{2}{3}$ chains; thence N. $6\frac{2}{3}$ chains to place of beginning, containing 4 acres.	5

Block or Township.	Range.	No. of Acres.
20 N.	3 E.	4

Full Cash Value of Land.	Full Cash Value of Improvements.
600.	

Ex. S.

C. B. E.

"Exhibit T."

Duplicate Assessment Roll of New Tacoma.

Name.	Description of Lands.	Lot or Section.
Givens, Mary A.	Commencing 60 chains North and 6 chains east S W of the W. M. corner of Sec. 5 T 20 N R 3 E of W. N. thence running E 6 chains; thence S $6\frac{2}{3}$ chains; thence W 6 chains; thence N $6\frac{2}{3}$ chains to the place of beginning, containing 4 acres.	5

Block or Township.	Range.	Number of Acres.
20 N	3 E	4

Full Cash Value of Land.	Full Cash Value of Improvements.
600	

C B E

And this was all the evidence offered and given in the case and the case was accordingly submitted to the court, and afterwards, on the 22d day of June, 1892, the court gave the decision and opinion herein filed.

And, afterwards, on the 23d day of June, 1892, the plaintiff duly filed his motion for a new trial of the said case, which motion was in the words and figures following, viz.:

In the Circuit Court of the United States for the District of Washingtoa.—Western Division.

F. V. McDonald, *Plaintiff,*
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants.*

Motion for a new trial.

Now comes the plaintiff and moves the court for a new trial of the said case for these:

I.

Insufficiency of the evidence to justify the decision of the court upon the facts.

II.

Insufficiency of the evidence to justify the decision of the court upon the law.

III.

The decision of the court that plaintiff was without title to the demanded premises, is against the law:

For that the deed by Matthews to plaintiff's immediate grantor, Mary A. Givens, under the power of attorney of her husband, vested her with the title to the demanded premises previously held by her husband, James H. Givens, and others.

For that the decree of partition vested plaintiff with all the title in the demanded premises theretofore held by the other parties thereto.

And for that plaintiff's said immediate grantor was the common source of title to the demanded premises.

This motion is made upon the evidence shown by the stenographer's extended notes and the documentary evidence adduced upon the trial of the case, together with the pleadings and proceedings in the case.

W. Scott Beebe and
John C. Stallcup,
Attorneys for Plaintiff.

Filed, June 23, 1892.

The said motion came duly on for hearing to the court on the 7th day of July, 1892, and upon consideration thereof by the court, was denied, to which ruling and judgment the plaintiff then and there duly excepted.

That thereupon the court gave the findings and judgment against the plaintiff, which appear of record herein, to which the plaintiff then and there duly excepted, and gave notice then and there that he would present his bill of exception and proceed to obtain a review of the said cause by the circuit court of appeals by writ of error, and then and there asked for, and was allowed extension of time in which to prepare and tender his bill of exceptions herein.

Inasmuch as the foregoing do not appear of record and to the end that the same may become a part of the record in this case, this bill of exceptions is prepared and now tendered by the said plaintiff, to the Honorable C. H. Hanford, the judge before whom the said case was tried, and proceedings were had that he may set his hand and seal hereto in evidence of the correctness hereof.

Which is accordingly certified and allowed, and done within the time given and allowed for performing and tendering the same.

In witness whereof, I hereunto set my hand and seal this 9th day of September, A. D., 1892.

C. H. HANFORD, [*Seal.*]

ENDORSEMENT.

No. 113, Law. F. V. McDonald *vs.* D. B. Hannah *et ux.* Bill of Exceptions. Filed Septemper 9th, 1892.

A. REEVES AYRES, *Clerk.*

And, afterwards, to-wit: On the 30th day of November, 1892, there was duly filed in said court in said cause a petition for writ of error, order thereon, assignment of error and bond on appeal, in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.— WESTERN DIVISION.

F. V. McDONALD, *Plaintiff,*
vs.
DOLPHUS B. HANNAH and KATE E. HANNAH, *Defendants.*
Petition.

Now comes the above named plaintiff, F. V. McDonald, and moves the court for an order allowing the plaintiff a writ of error in this cause to the United States Court of Appeals, and fixing the amount of the bond to be given by him.

W. SCOTT BEEBE and
JOHN C. STALLCUP,
Attorneys for F. V. McDonald.

Upon reading the foregoing petition, and it appearing therefrom and from the record of said cause that it is a proper cause for the allowance of a writ of error, it is ordered that said motion be granted and that a writ of error be allowed, and that said F. V. McDonald enter into security on said writ of error, as required by law, in the sum of five hundred ($500.00) dollars.

C. H. Hanford, *Judge.*

November 29, 1892.

ENDORSEMENT.

Filed November 30, 1892.

A. Reeves Ayres, *Clerk.*

In the Circuit Court of the United States for the District of Washington.--Western Division.

F. V. McDonald, *Plaintiff,*
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants.*

Assignment of errors.

Now comes the plaintiff and presents and files this, his assignment of errors, and says that on the record and proceedings of the above entitled court in the above entitled cause, and also in making and entering the findings and judgment therein against the plaintiff and in favor of defendants, there is manifest error in this, to-wit:

I.

The court erred in its second finding of fact in finding "that the plaintiff is not the owner in fee of, nor has he a right to, nor is he entitled to the possession of the real property" described in the plaintiff's complaint.

II.

That the court erred in its third finding of fact in finding that the defendants' do not wrongfully withhold the premises described in plaintiff's complaint, from the plaintiff.

III.

The court erred in concluding as a matter of law "that judgment should be entered herein dismissing plaintiff's action."

IV.

The court erred in concluding "that plaintiff's action be and the same is hereby dismissed, and that the defendants do have and recover from the plaintiff the costs and disbursements of this action, to be taxed by the clerk."

V.

The court erred in deciding that "Exhibit C," in the bill of exceptions in this case, the same being a decree in partition in the case of F. V. McDonald *vs.* John Donaldson and others, in the circuit court of the United States, for the district of Washington, was not binding upon defendants and was not competent evidence to show title in plaintiff as against defendants, and did not constitute a link in the claim of plaintiff's title to the said real property.

VI.

The court erred in deciding that plaintiff's grantor, Mary A. Givens had no title or interest in the said real property, except dower, and in deciding that the same had not been assigned to her.

VII.

The court erred in deciding that plaintiff's grantor, Mary A. Givens, was not the owner in fee at the date of her conveyance of the said real property to the plaintiff, and in denying plaintiff the benefit of the rule that neither plaintiff nor defendant was at liberty to deny that Mary A. Givens owned said property at the date of said conveyance.

VIII.

The court erred in admitting in evidence a certified copy of an instrument claimed by defendants to be a deed from the Territory of Washington to Wm. B. Kelly; said instrument being a part of the bill of exceptions herein and marked "Exhibit N."

IX.

The court erred in holding and deciding that the said instrument claimed by defendants to be a deed from the Territory of Washington to Wm. B. Kelly, was valid, and in permitting it to be read in evidence, notwithstanding the notice required by statute of the time for redemption had not been given.

X.

The court erred in giving judgment for the defendants and in not giving judgment for the plaintiff to the effect that he was the owner in fee of the said real property and entitled to the possession thereof, and for the recovery thereof.

XI.

Wherefore, the plaintiff, F. V. McDonald, for the reasons assigned, prays that said judgment of the circuit court of the United States, for the district of Washington, be reversed and said court be directed to enter judgment for the plaintiff as prayed in his complaint.

W. Scott Beebe and
John C. Stallcup,
Attorneys for Plaintiffs.

ENDORSEMENT.

Assignment of errors. Filed November 30th, 1892.
A. Reeves Ayers, *Clerk.*

In The Circuit Court of the United States for the District of Washington.—Western Division.

F. V. McDonald, *Plaintiff,*
vs.
Dolphus B. Hannah and Kate E. Hannah, *Defendants.*

Know all Men by These Presents: That the above named plaintiffs, F. V. McDonald and G. C. Sawyer, are held and firmly bound unto Dolphus B. Hannah and Kate E. Hannah, the defendants herein, in the full sum of five hundred ($500) dollars to be paid to the said Dolphus B. Hannah and Kate E. Hannah, their heirs, executors and

administrators, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly andseverally, firmly by these presents.

Dated November 30th, 1892.

F. V. McDonald, [*Seal.*]
G. C. Sawyer. [*Seal.*]

The consideration of the above obligation is such that,

Whereas: The above named F. V. McDonald has taken a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above entitled action by the Circuit Court of the United States for the District of Washington, in the western division thereof; and said F. V. McDonald is desirous of giving security on said appeal and writ of error for the prosecution thereof, and for costs in accordance with law and the order of this court in that regard made:

Now, therefore, if the above named F. V. McDonald shall prosecute the said writ of error herein to effect, and shall answer all costs if he shall fail to make good his said writ of error, then this obligation shall be void, otherwise to remain in full force and virtue. F. V. McDonald,
G. C. Sawyer.

State of Washington, }
County of Pierce. } *ss.*

G. C. Sawyer, being duly sworn, for himself says: That he is a resident of the State of Washington, and is not an attorney or counsellor-at-law, clerk, sheriff, marshal or other officer of a court of justice; and that he is worth one thousand ($1,000.00) dollars over and above his just debts and liabilities and property exempt from execution.

G. C. Sawyer.

Subscribed and sworn to before me, this 28th day of November, 1892. Frederick M. Hedger,
Notary Public for the State of Washington, Residing at Tacoma.

Approved by me November 29, 1892.

C. H. Hanford, *Judge.*

ENDORSEMENT.

Filed November 30, 1892. A. Reeves Ayers, *Clerk.*

UNITED STATES OF AMERICA, ss.

The President of the United States of America, To the Judges of the Circuit Court of the United States, for the District of Washington, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between F. V. McDonald, plaintiff, and Dolphus B. Hannah and Kate E. Hannah, defendants, a manifest error hath happened, to the great damage of the said F. V. McDonald, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of the appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco, in the State of California, within thirty days from the date hereof, to be there and then held, that the record and proceedings aforesaid be inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, chief justice of the supreme court of the United States, this 30th day of November, in the year [*Seal.*] of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

A. REEVES AYERS,
Clerk of the United States Circuit Court for the District of Washington.

The above writ of error is hereby allowed.

C. H. HANFORD,
District Judge, Presiding in said Circuit Court.

Service of the within writ of error by receipt of a copy thereof, is hereby admitted at Tacoma, State of Washington, this 3d day of December, 1892.

[*Signed.*] W. C. SHARPSTEIN,
Attorney for Defendants in Error.

UNITED STATES OF AMERICA, ss.

To Dolphus B. Hannah and Kate E. Hannah, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district Washington, western division, wherein F. V. McDonald is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, chief justice of the supreme court of the United States this 30th day of November, A. D. 1892, and [*Seal.*] of the Independence of the United States, the one hundred and seventeenth.

C. H. HANFORD,
District Judge Presiding in said Circuit Court.

Service of the within citation by receipt of a copy thereof is hereby admitted at Tacoma, State of Washington, this third day of December, 1892.

[*Signed.*] W. C. SHARPSTEIN,
Attorney for Defendants in Error.

United States of America, }
District of Washington. } *ss.*

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the district of Washington, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages numbered from one to 187 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of F. V. McDonald, plaintiff in error, against Dolphus B. Hannah and Kate E. Hannah, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of Tacoma, in the District of Washington, this 1st day of December, in the year of our Lord [*Seal.*] one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

A. Reeves Ayres, *Clerk.*

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

F. V. McDONALD,
Plaintiff in Error,
vs.
DOLPHUS B. HANNAH, *et. al.*,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

W. SCOTT BEEBE,
J. C. STALLCUP,
C. R. HOLCOMB,
Attorneys for Plaintiff in Error.

PORTLAND, OREGON:
CASEY-WATSON PRINTING CO., FOOT OF MORRISON STREET.
1893.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

F. V. McDONALD,
Plaintiff in Error,
vs.
KATE E. HANNAH AND D. B. HANNAH,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON.

STATEMENT OF FACTS.

Plaintiff in error brought ejectment in the court below to recover the possession of four acres of land, situated in Tacoma, Pierce county, State of Washington, of the value of forty thousand dollars ($40,000). The pleadings on the part of the plaintiff contain the usual allegations peculiar to this kind of action.

The defendants claim to own the property by virtue of certain tax proceedings and deed, all of which are set out at length in their answer.

The court, after considering all the evidence, decided that the plaintiff had not made a *prima facie* case, and gave judgment against him for costs.

The bill of exceptions contains all the evidence, and the assignment of errors present the questions upon which we ask the judgment of this court.

Plaintiff contends that his case showed a perfect legal title in him, and was sufficient in any event to warrant a judgment in his favor, and that he established a *prima facie* case in three ways.

I.

TITLE BY DEED.

A patent from the United States to Thomas Hood.

A deed from Thomas Hood to C. P. Ferry and L. C. Fuller.

A deed from C. P. Ferry and L. C. Fuller and their wives to E. M. Burton.

A deed from E. M. Burton to C. P. Ferry and L. C. Fuller.

A deed from Ferry and Fuller and their wives to Workingmen's Joint Stock Association, a corporation.

A deed from Ferry and Fuller and their wives and the Workingmen's Joint Stock Association to George P. Riley and thirteen others.

A power of attorney from George P. Riley and thirteen others to John W. Matthews.

A deed from George P. Riley and others by John W. Matthews (their attorney in fact) to Mary A. Givens.

A deed from Mary A. Givens to the plaintiff.

Each of the above conveyances purport to convey the property in question, and each conveyance is regularly executed, except that objection is made that the power of attorney was not executed by all the tenants in common, although they are all named in the body of the instrument.

There were fourteen tenants in common of this land and eleven joined in the power authorizing Matthews to sell their interest therein. This he did and executed and delivered a deed of this premises to Mary A. Givens. This deed, we contend, operated to invest her with the legal title to eleven-fourteenths, and if we are correct in this, she or her

grantee can maintain ejectment against any person in possession who does not hold under one or more of the other tenants in common.

"A deed executed by only a part of the persons named in the body as grantors is good as to the executing parties and conveys their interest in the property."

Colton vs. Seavy, 22 Cal. 497.
Spect vs. Gregg, 51 Cal. 198.

Sedgwick and Wait on trial of title to land, Section 300.

Stark vs. Barratt, 15 Cal. 361, 68, 70.
Prenn vs. Emerick, 6 Ohio, 391.
Barnhart vs. Campbell, 50 Mo. 597.
Gales vs. Salmon, 35 Cal. 588.
Sutter vs. San Francisco, 36 Cal. 115.
Chapman vs. Godfrey, 18 Mich. 38.

II.

TITLE BY DECREE.

The plaintiff also introduced in evidence a decree in partition rendered in the circuit court of the United States for the district of Washington, in the case of F. V. McDonald against John Donaldson, *et. al.*

By this decree the title both legal and equitable to the property in question was established in the plaintiff as the grantee of Mary A. Givens.

The defendants in error were not made parties in that case, and they insist for that reason that the decree is not binding upon them, and does not and cannot affect any right they may have in or to this property.

We concede the correctness of this general proposition, but it has no application in a case like this.

In the partition case the decree partitioned the property according to equitable principles between all the tenants in common of the property, and, of course, is conclusive between them, and operates to confirm to plaintiff the title to this land as effectually as a deed from them could have done.

And it also operates to establish the fact of title as therein decreed so far as the defendants in error are concerned, unless it appears that they had some interest in the property; it is not pretended that defendants in error have any interest unless the tax title asserted in their answer is good. If they have no title or interest susceptible of establishment in a court they are not in a position to say that the decree does not settle the title.

This doctrine is the exception to the general proposition above stated; and commencing with Burr vs. Gratz, 4 Wh. 213, the courts of this country have in an unbroken line of decisions established this proposition.

"An error alleged is, that the court allowed the decree of the circuit court in the chancery suit between Michael Gratz and John Craige and others, to be given in evidence to the jury; in our opinion this record was clearly admissible."

"It is true that in general, judgments and decrees are evidence only in suits between parties and privies, but the doctrine is wholly inapplicable to a case like the present when the decree is introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate without establishing the existence of the decree it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiff's which was made under the authority of that decree.

"And under such circumstances to reject the proof of the decree would be in effect to declare that no title derived under a decree in chancery was of any validity, except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity.

"It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit because they were *res inter alios acta*."

Barr vs. Gratz's Heirs, 4 Wh. 213.
Gregg vs. Forsyth, 24 How. 179.
Durst vs. Morris, 14 Wal. 484.
Sitton vs. Gregg, 31 Me. 488.

"A stranger to the title and having no interest in the property cannot attack the decree."

Custer vs. Shipman, 35 N. Y. 533.
Buskingham vs. Hannah, 2 Ohio St. 561.
Fowler vs. Savage, 3 Conn. 90.
Gage vs. Condy, 30 N. E. 320.
Kooler vs. Hoffman, 1 McCrary, 492.
Freeman on Judgments, Section 416.

III.

COMMON SOURCE OF TITLE.

The plaintiff claims title by deed from Mary A. Givens, dated October 17, 1886.

Defendants claim that the property in question was assessed to and sold as the property of Mary A. Givens, and in their answer they allege that she owned the property at the time of the assessment, and if this claim is true she is presumed to have been the owner.

Hews vs. McClellan, 80 Cal. 303.

Because the assessment would be a nullity if made in the name of any person other than the owner.

—— vs. Bair, Was. Sup. St. Feb. 14, 1893.
Abbott vs. Lindinboner, 42 Mo. 162.
Bird vs. Benlisi, 12 Sup. Ct. Rep. 323.

Defendants also claim and allege in their answer that this property was sold, and that a tax deed was made by the sheriff pursuant to said assessment and sale, and they claim solely under said tax deed, dated September 16, 1886.

The recitals in the tax deed are to the effect that the property was assessed to Mary A. Givens, and that she owned the property, and that the taxes were due from her.

We claim, therefore, that the defendants derive title, if they have any, from Mary A. Givens, and that under the pleadings and evidence it is conclusively established that both parties claim from and under the same common source.

Neither party, therefore, will be permitted to deny that Mary A. Givens was the owner of the property at the time when it is claimed she was divested of her title.

No question of law is more fully established than this.

"In ejectment suits where both plaintiff and defendant claim title from the common source, the plaintiff is only required to prove such source of title, as neither will be permitted to dispute such title."

Jackson vs. Tatebo, 3 Was. 461.

"The plaintiff and defendants both claim under Shiel, and it is not necessary for either to prove title further back than him.

"The defendants sets up an estate in fee in Willis in the premises to defeat a recovery by the plaintiff in this action, and if he has any interest therein, upon the evidence, it is derived from Shiel by means of the sheriff's sale and deed.

"The plaintiff claims under Shiel also, by a conveyance subsequent to that of the sheriff's. Neither is, therefore, at liberty to deny Shiel's title at the time of the sheriff's sale."

Mickey vs. Stratton, 5 Saw. 475.

"Where both parties assert title from a common source and no other source, neither can deny that such common grantor had a valid title."

Robertson vs. Pickrel, 109 U. S. 617.
Cox vs. Hast, 145 U. S. 964.
Cook vs. Avery, 13 Supt. Ct. Rep. 347.

"If both parties claim title from the same person neither is at liberty to deny that such person had title."

Gaines vs. New Orleans, 6 Wal. 718.

"It is true there is a rule in action for the recovery of land that the plaintiff must recover on the strength of his

own title; but to that rule there is a well-established exception, when the plaintiff and defendant claim from the same common source."

Johnson vs. Cobb, 7 S. E. 601.

"In actions of ejectment where both the plaintiff and defendant claim under the same third person it is *prima facie* sufficient for the plaintiff to prove such common derivation without proving that such third person had title."

Laidley vs. Land Company, 4 S. E. 707.

"Where both parties claim title from the same intermediate grantor, it is not prejudicial to permit plaintiff to put in evidence the original patent since the state of the title antecedent to the common source is immaterial."

Gallagher vs. Bell, 47 N. W. 897.

"Where both parties in ejectment claim through a common grantor, it is sufficient for the plaintiff to prove title to that source."

McWhorter vs. Hetzel, 24 N. E. 743.

"It is unnecessary and immaterial to go back of a common source and determine whether he had a complete chain of title."

Ebersole vs. Rankin, 15 S. W. 424.

"Where the plaintiff shows from the deeds offered or the admission in the pleadings that both claim from a common source, he is required to exhibit a better title in himself, derived from it, than the defendant in order to establish *prima facie* his right to recovery; *it does appear from the pleadings and evidence that he claims under a tax title*

for the plaintiff's interest, and if that is shown to be void, there is no other obstacle in the way of plaintiff's recovery."

Bonds vs. Smith, 11 S. E. 322.

"There were certain title papers given in evidence by plaintiff in the line of title to the ownership of Sarah Stuart, to which defendant objected as ineffectual to pass legal title, and which the court told the jury were ineffectual to do so, but as both parties claim under Sarah Stuart, the plaintiff need not have traced his title further back than her, to show that she had title."

Lowe vs. Settle, 9 S. E. 923.

"If in an action of ejectment both parties claim title from the same source, it is not necessary for the plaintiff to introduce in evidence a conveyance from a former owner to the person having this source of title, *and if error is committed in admitting the record, it was an error which could not have injured the defendant.*"

Spect vs. Gregg, 51 Cal. 200.

"Where the plaintiff only proved conveyance from the common grantor, the objection that he established no title in such grantor, is cured if the defendant sets up in defense his own conveyance from the same person, he being then estopped from denying such title."

Ellis vs. Jeans, 7 Cal. 409.

"If evidence of title back of a common source is offered, *it is immaterial whether it shows a good title in the common source or not*, neither party will be permitted to question that title."

Bank vs. Harrison, 39 Mo. 433.
Dupont vs. Davis, 30 Wis. 176.
Sexton vs. Rhames, 13 Wis. 102.
Farrell vs. Hennessy, 21 Wis. 634.
Finch vs. Ulman, 24 Am. St. 383.

The defendants in their answer pleaded specially their title and are thereby precluded from showing any title other than that conveyed by the tax deed.

The rule seems to be well settled that in this statutory action, if the defendant pleads his title specially, he waives the general issue and is confined to the defense thus specially pleaded. In Jones vs. Johnson, 19 S. W. 522, the supreme court of Texas said:

"The principal which underlies this doctrine, is, that when a party, either plaintiff or defendant in an action of trespass to try title, pleads his title specially, he gives his adversary notice that he rests his case upon the title so pleaded, and it is to be presumed that he relies upon no other."

Cook vs. Avery, 13 Sup. Ct. Rep. 347.

It follows necessarily therefore, that if defendant's tax title is valid, this case should be affirmed; but if no title was conveyed by the tax deed, the judgment should be reversed.

DEFENDANT'S TAX TITLE.

Plaintiff contends that the defendants are in possession of the property without any title or valid claim thereto, their only claim of title is said tax title, which we insist is void.

I.

Because the property was never assessed.

The property to recover which this action is brought, is properly described as: "Commencing 53½ chains *north* and 6 chains *east* of the *southwest* corner of section 5,

in township 20 north, range three (3), *east* of the Willamette meridian; thence running *east* 6 chains, thence *south* 6⅔ chains; thence *west* 6 chains; thence *north* 6⅔ chains to the place of beginning, containing four (4) acres."

The description on the assessment roll is as follows:

"Commencing 60 chains *north* and 6 chains *east* of the *northwest* corner of section five (5), township twenty (20) *north*, range 3, *east* of the Willamette meridian; thence running *east* 6 chains; thence *south* 6⅔ chains; thence *west* 6 chains; thence *north* 6⅔ chains to the place of beginning, containing four (4) acres."

The description employed in the assessment roll, was carried into the duplicate assessment roll, and in the advertisement or notice of sale.

There has not been, therefore, any taxation or sale of the property sued for, and necessarily the tax deed is void.

Cooley on Taxation, 352.
Bird vs. Bentisa, 12 Sup. Ct. Rep. 328.

II.

THE TAX DEED.

This deed falsely recites the assessment and sale of the property sued for, a circumstance that is legitimately explained upon the theory that some *disinterested* person attempted to cover up the invalidity of the tax proceedings by procuring a deed, which, on its face, showed the apparent validity of the proceedings prior to its execution.

Section 2934 of the statute provides that a tax deed shall run: "*In the name of the Territory of Washington.*"

This statute was taken from a statute of Wisconsin which provides that all tax deeds shall run in the name of the State of Wisconsin.

The supreme court of that state has repeatedly decided that unless the tax deed conforms to that provision it is void on it face.

Edgerton vs. Bird, 6 Wis. 527.
Woodman vs. Clapp, 21 Wis. 462.
Lindsley vs. Jay, 25 Wis. 462.

This deed does not run in the name of the territory, but in the name of the sheriff, this is conclusively shown by the granting clause in the deed which is as follows, viz.:

"NOW, THEREFORE, THIS INDENTURE WITNESSETH, That for and in consideration of the sum of $4.78, to the sheriff paid at the time of making said sale, the receipt whereof is acknowledged in said certificate of sale. *I, Lewis Boyd, sheriff of Pierce county, Washington territory, by virtue and in pursuance of the statutes in such cases made and provided, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell and confirm unto the said W. B. Kelley, and to his heirs and assigns forever, * * * as fully and absolutely as I, Lewis Bird, sheriff as aforesaid, may or* can fully sell the same. * * *

"IN WITNESS WHEREOF, *I have hereunto set my hand and seal the day and year first hereinbefore written.*"

III.

The deed is void because the sheriff was not authorized to make it.

The attempted assessment and sale was for city taxes of Tacoma, Washington territory.

The only provision of the charter affecting this question is found in Section 34, which provides that the city has power "to assess, levy and collect taxes for general municipal purposes, not to exceed one-half of one per cent. per annum upon all property, both real and personal within the city which is by law taxable for territorial and county purposes."

Clearly the power to sell land for delinquent taxes is not conferred by this section. Authority "to assess, levy and collect," does not include the power to enforce collection for the non-payment of the tax by a sale and conveyance of the property.

Cooley on Taxation.
Paine vs. Sprately, 5 Kan. 450.
McInnery vs. Moodey, 25 Iowa, 410.
Merriam vs. Moodey, 25 Iowa, 163-70.
Morrison vs. Hershiu, 32 Iowa, 271.

Landreth vs. Lang, 6 Kan. 274.
Hays vs. Hogan, 5 Cal. 241.

Section 1 of the charter expressly authorizes the city to sue and be sued, and the power, therefore, "to assess, levy and collect," taxes can be enforced, and the object of the corporation secured without the power of sale. The power of sale is not a necessary incident to the power "to assess, levy and collect," nor is such power indispensable to the objects and purposes of a municipal corporation, it can enforce the collection of its taxes by the ordinary judicial proceedings in the courts, and it will be presumed that that means of enforcing payment was intended whenever the power to sell is not expressly given and conferred by the charter.

McInnery vs. Reid, 23 Iowa, 410.
Merriam vs. Moodey, 25 Iowa, 170.
Paine vs. Spratley, 5 Kan. 537.
Blackwell on Taxation, 448.

If, therefore, the power to sell has not been conferred by the charter, no authority to execute a conveyance is conferred; the power to "collect" will not warrant the execution of a deed.

"In the matter of the sale and conveyance of lands for the non-payment of taxes, municipal corporations have no implied powers, they can execute only such authority as has been expressly given by statute, and that authority must be strictly construed and pursued, the express power conferred on a corporation to levy taxes and sell lands for the non-payment of them has been held not to imply or give the corporation power to convey land sold to the purchaser."

Blackwell on tax titles, 448-9.
Knox vs. Peterson, 21 Wis. 247.
2 Dillon on M. C. Section 818.

IV.

This deed is not made by the city or any of its officers, and we have been unable to discover any authority in the charter which warrants a sale by the sheriff of the county, or a deed by either the sheriff or the territory, and we contend that the deed is void for that reason.

The deed also recites that the notice of sale stated that said property would be sold to satisfy "All tax penalties, interest and costs due the territory and the said county." It does not say that said property would be sold to satisfy city taxes.

V.

STATUTE OF LIMITATION.

Section 2,939 of the general statutes of 1881 provide that—

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid on (or) the land redeemed as provided by law, shall be commenced within three years from the recording of the tax deed of sale and not thereafter, except by the purchaser at the tax sale."

Defendant's tax deed was recorded more than three years before the institution of this action, and defendants claim the benefit of this section of the statute, and insist that the tax deed cannot be attached for any cause after the expiration of three years from the recording of the tax deed.

That section applies only in a case where the action is for "*the recovery of land sold for taxes.*" We have shown that *this* land was not assessed, advertised or sold for taxes, and that there were no taxes levied on the land, consequently it could not be sold "for taxes."

Bird vs. Benlisi, 12 Sup. Ct. Rep. 324.

The above section appears in the general revenue laws of the territory, and is expressly referable and made applicable to deeds executed pursuant to a sale of lands for delinquent territorial and county taxes, and does not operate in the case of a sale of lands for city taxes unless expressly made applicable by the charter.

1 Dillon, Section 816.
Brown vs. Spokane Falls, 27 Pac. Rep. 1,079.
Gould vs. Baltimore, 59 Md. 378.
Moore vs. Baltimore, 61 Md. 224.
Denver vs. Knowles, 30 Pac. Rep. 1,041.
Tounsend vs. Lute, 109 U. S. 504.

VI.

The statute of limitation does not operate in a case where the tax deed is void upon its face.

Redfield vs. Parks, 132 U. S. 239.
Moore vs. Brown, 11 How. 414.
Watson vs. Door, 18 Kan. 223.
Hafford vs. McKenna, 23 Fed. Rep. 36.
Daniels vs. Case, 45 Fed. Rep. 843.
Gomer vs. Chaffee, 6 Cal. 314.
Sheehy vs. Hinds, 27 Minn. 259.
Mason vs. Gorman, 85 Mo. 526.
Richards vs. Thompson, 23 Pac. Rep. 106.
Sims vs. Drexel, 78 Iowa, 255.
Wagoner vs. Mann, 48 N. W. 1,065.

VII.

If the deed is regular on its face but void because some essential steps in the exercise of the taxing power has not been complied with, it will not operate to set the statute of limitations in motion.

Easley vs. Whittenham, 43 Iowa 162.
Bird vs. Bensili, 12 Sup. Ct. Rep. 323.
Hurd vs. Brisner, 28 Pac. Rep. 371.
Melchoer Chair Co. vs. Bair, Wash. Sup. Ct.
——— ———February 14, 1893.
See cases last above cited.

VIII.

February 3d, 1886, the legislature enacted a law which provides that no tax deed should issue until after service of a notice of the exemption of the time for redemption had expired.

Without a citation of the numerous authorities holding that a tax deed is void unless the notice is given, we refer to the case of Coulter vs. Stafford, now under consideration in this court, where this identical question is involved. The decision in that case must determine this question in this case.

The opinion of the circuit court is that the only interest Mary A. Givens ever had in the property was dower as the widow of James H. Givens, deceased, and that neither she nor her grantee could maintain ejectment until after assignment of her dower.

We respectfully submit that there is no such question in this case.

This valuable property defendants claim was sold to their grantor for four dollars and seventy-eight cents, ($4.78) and to sustain such sale they exhibit and claim under a deed false in its recitals, and based upon proceedings which disclose an attempt by some one to alter the city records.

All the testimony in this case is before this court, and if the tax deed is found to be invalid, the case should be reversed and the lower court directed to enter a judgment according to the prayer of the complaint.

W. SCOTT BEEBE,
J. C. STALLCUP,
C. R. HOLCOMB,
Attorneys for Plaintiff in Error.

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IN THE

U. S. CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

F. V. McDONALD,
Plaintiff in Error,
vs.
DOLPHUS B. HANNAH ET. AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

W. C. SHARPSTEIN,
Attorney for Defendants in Error.

TACOMA, WASHINGTON:
ALLEN & LAMBORN, PRINTERS.
1893.

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Plaintiff in Error,
vs.
DOLPHUS B. HANNAH ET. AL.,
Defendants in Error.

STATEMENT OF FACTS.

The plaintiff claims title to the premises in controversy by several distinct chains:

FIRST CHAIN.

1. Deed from Mary A. Givens to plaintiff, dated October 17th, 1888.

Exhibits A and B, Record, pp, 46 to 51.

2. Decree of the United States Circuit Court of the District of Washington in a suit wherein the plaintiff in error was complainant and a large number of parties were defendants, the defendants herein not being of the number, which suit was for the partition of a tract of sixty acres of which the premises in controversy were a part, dated November 25th, 1891, in which decree the premises in controversy were allotted to plaintiff herein.

Exhibit C, Record, pp. 51 to 73.

SECOND CHAIN.

1. Patent of the United States to Thomas Hood, 160 acre tract.

Exhibit F, Record, pp. 86-87.

2. Deed from Thomas Hood to C. P. Ferry and L. C. Fuller; same land as above.

Exhibit G, Record, pp. 88-89.

3. Deed from L. C. Fuller and wife and C. P. Ferry and wife to E. M. Burton; same land as above.

Exhibit H, Record, pp. 89 to 92.

4. Deed of E. M. Burton and wife to L. C. Fuller and C. P. Ferry; same land as above.

Exhibit I, Record, pp. 92 to 94.

5. Deed of L. C. Fuller and wife and C. P. Ferry and wife to the Workingmen's Joint Stock Association, of Portland, Oregon; 60 acres of above.

Exhibit J, Record, pp. 94 to 96.

6. Deed of L. C. Fuller and wife and C. P. Ferry and wife and the Workingmen's Joint Stock Association, of Portland, Oregon, to William Brown, 39-464, George Luviney 65-464, John Huntington, John Donaldson, Edward Simmons, Charles Gilbert, George P. Riley, George Thomas, James H. Givens, Charles Howard, Mary H. Carr, Anna Rodney, George Washington, Philip Francis, 30-464 each, of 60-acre tract, dated February 10th, 1871.

Exhibit K, Record, pp. 97 to 99.

James H. Givens died in 1872; Mary A. Givens was his wife. They had no children. Upon proof of these facts it was assumed that the interest of James H. Givens descended to Mary A. Givens.

Bill of Exceptions, Record, p. 36.

THIRD CHAIN.

1. Continuing from the second chain of title ending in Exhibit K, the plaintiff in error introduced a power of attorney from the persons named as grantees, in Exhibit K, to one John W. Matthews, constituting him "Our true and lawful attorney for us and in our

names, place and stead, to grant, bargain, sell, convey, alien, remise, release, quit-claim, assign or transfer all such lands for such sum or price and on such terms as to him shall seem meet." * * * * * * "And for all the powers aforesaid for us and in our names to make, execute, acknowledge and deliver all necessary deeds, with or without seal." This power of attorney is dated September 5th, 1871.

Exhibit L, Record, pp. 99 to 102.

2. A deed from John W. Matthews, as attorney in fact for all of his principals except James H. Givens, to Mary A. Givens, of the premises in controversy.

Exhibit M, Record, pp. 102 to 105.

ARGUMENT ON THIRD CHAIN OF TITLE.

For the purpose of argument we will examine these three chains of title separately, beginning with the last. Conceding, for the sake of the present argument, that title had been conveyed to all the persons named as grantors in the power of attorney to John W. Matthews, did that instrument confer authority upon the attorney in fact to convey the premises described in the power? By examining the instrument itself, found on pages 100 and 101, it will be observed that the name of one of the principals, Ed. S. Simmons, appears as having been attached to the power in this manner:

ED. S. SIMMONS,
By A. S. GROSS, Attorney. [SEAL.]

The name of another principal, George Thomas, appears thus:

GEORGE THOMAS,
By GEO. P. RILEY, proxy. [SEAL.]

And the name of another principal, Anna Rodney, appears thus:

ANNA RODNEY,
Per CHAS. [her X mark.] HOWARD, her proxy. [SEAL.]

The authority of Gross, Riley and Howard for thus signing the names of persons purporting to be principals, is not shown, and under the decision of the Supreme Court of the United States in

Denn vs. Reid, 10 Peters, 524;

and of the Supreme Court of Washington in

Territory vs. Klee, 1 Washington, 183, 187,

the execution of this power of attorney as to Simmons, Thomas and Rodney was ineffectual, and the attorney in fact could not convey the interests of these parties. But we contend that the power was joint, and that if it was inoperative as to any of the principals it was inoperative as to all.

The deed (Exhibit M, Record, pp. 102-105) which purports to have been executed by John W. Matthews, as attorney in fact, for all of the persons named in the power of attorney, with the exception of James H. Givens, whose name does not appear in the instrument at all, was, on account of the objections urged to the

power itself inoperative to convey title to Mary A. Givens. But in addition to the objections urged to the power of attorney, the further objection is made that at the time of the execution of Exhibit M, James H. Givens, one of the principals named in the power of attorney, was dead,

(Record, page 36,)

and under the familiar rule that the death of the principal operates as a revocation of the agent's authority, where that is not coupled with an interest, the deed conveyed no title to Mary A. Givens

Frink vs. Roe, 70 Cal., 296.

S. C. 11 Pac. Rep., 820.

McClaskey vs. Barr, 50 Fed. Rep., 412.

And where the power is a joint power, the death of one extinguishes the entire power.

Hanrick vs. Patrick, 119 U. S., 156.

S. C. 7 S. Ct. Rep., 147.

Rowe vs. Rand, 111 Ind., 206.

S. C. 12 N. E. Rep., 377.

Gilbert vs. Howe, 45 Minn., 121.

S. C. 47 N. W. Rep., 643.

Louis vs. Elfelt, 89 Cal., 547.

S. C. 26 Pac. Rep., 1095.

ARGUMENT ON SECOND CHAIN OF TITLE.

Going back to the next preceeding deraignment of title, to-wit: That proceeding from the patent of the United States we observe first, that the deed (Exhibit G, Record, pp. 88 and 89) purports to have been acknowledged before one "R. Wilcox, Clerk of the District Court of the United States for the District of Oregon," and the venue of the certificate as follows: "United States of America, District of Oregon." This instrument purports to have been acknowledged on the 14th of September, 1868. At that time the Act of January 31st, 1867, was in force, which provided "That deeds * * of lands * * situated in this Territory may be executed or acknowledged in any other state or territory of the United States in the form prescribed for executing and acknowledging deeds within this Territory, and the execution thereof may be acknowledged before any judge of a court of record, notary public, justice of the peace, or before any commissioner appointed by the Governor of this Territory for such purpose."

Statutes Washington, 1873, p. 465.

Abbott's Real Property Statutes, p. 275.

No act has ever been passed by the Legislature of Washington permitting the Clerk of the United States District Court of another State to take acknowledgments of deeds unless a subsequent statute, Act of No-

vember 13th, 1873, providing that "Deeds * * * of land * * * situated in this Territory may be executed or acknowledged in any other state or territory of the United States, in the form prescribed for executing and acknowledging deeds within this Territory, and the execution thereof may be acknowledged before any person authorized to take acknowledgments of deeds by the laws of the state or territory wherein the acknowledgment is taken, or before any commissioner appointed by the Governor of this Territory for such purpose."

Statutes Washington, 1877, p. 312.

Abbott's Real Property Statutes, p. 276.

Or the further provision that "All deeds heretofore acknowledged according to the provisions of this Act, are hereby declared legal, * * * *

Statutes Washington, 1887, p. 312,

Abbott's Real Property Statutes, p. 276,

includes such officer.

Referring to the laws of Oregon at the time this deed was acknowledged, we find that the persons authorized to take acknowledgments are as follows; Any Judge of the Supreme Court, County Judge, Justice of the Peace or Notary Public within the State.

Gen. Laws of Ore., compiled and annotated by M. P. Deady, Section 10, Page 648.

This law has never been altered, and there has never been any legislation on the part of the Legislature of Washington making valid acknowledgments taken by persons not authorized to take them.

Passing from this instrument we come to the deed, (Exhibit K, Record, pp. 97, 99), which purports to convey to a number of persons undivided interests, among others James H. Givens a 30-464 interest in and to a sixty-acre tract, embracing the premises in controversy. James H. Givens died in 1872. At the time of his death he was married to Mary A. Givens. Givens and his wife were married before coming to Portland, Oregon, to which place they came from New Bedford, Mass. From the time of their arrival in Portland to the time of the death of James H. Givens, Portland was their residence, and they never resided in Washington Territory.

Par. 6, Bill of Exceptions, Record, p. 36.

At the time of the making of the deed purporting to convey to James H. Givens an undivided 30-464 interest in and to the sixty acres there was in force in the Territory of Washington the Act of December 2d, 1869, entitled "An Act defining the rights of husband and wife."

Statutes Washington, 1869, p. 318-323,

Abbott's Real Property Statutes, pp. 417, 474,

which provides, among other things, that "All property

acquired after the marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property." (Sec. 2).

"In every marriage hereafter contracted in this Territory the rights of husband and wife shall be governed by this Act." * * * * (Sec. 11).

"The rights of husband and wife married in this Territory, prior to the passage of this Act, or married out of this Territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this Act, with respect to such property as shall be hereafter acquired." * * * (Sec. 12).

Side by side with this law there existed an act entitled "An Act relating to estates in dower and by the courtesy," approved January 30th, 1864.

Statutes Washington, 1863-4, p. 6-12,

Abbott's Real Property Statutes, p. 468-470,

which provides "That the widow of every deceased person shall be entitled to dower for the use during her natural life of one-third part of all the lands whereof her husband was seized, of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." (Sec. 1.)

* * * * "Any woman residing out of the Territory shall be entitled to dower of the lands of

her deceased husband, lying in this Territory, of which her husband died seized, and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within the Territory at the time of his death." (Sec. 21.)

It will thus be seen that the Act of 1869 affected only those persons who had been married within the Territory prior to the passage of the Act, or who had been married out of the Territory, but who should subsequently reside and acquire property in the Territory, and that the Act relating to dower, although it was undoubtedly repealed by implication, so far as residents of the Territory were concerned, who came within the designation described in Section 12 of the Act of 1869, the status of parties residing out of the Territory was left unaffected, and the widow was only entitled to a dower interest. Before the death of James H. Givens, an act was passed entitled "An Act defining the rights of persons and property, as affected by marriage," approved November 29th, 1871.

Statutes of Washington, 1871, p. 67-74.

Abbott's Real Property Statutes, p. 474-478.

This act was, in all respects, so far as the questions involved in this case are concerned, similar to the Act of 1869, with the exception that by section 23 of the act it was provided "Neither dower or courtesy shall hereafter accrue," but by Section 25 of the same act it is as-

serted "The rights of all married persons now living in this Territory, and of all who shall hereafter live in this Territory, shall be governed by this Act." This statute adhered in unmistakable language to the distinction between the status of married persons residing without the Territory and of those residing within the Territory, As to the former, the law relating to dower remained in force. As to the latter, the law commonly known as the Community Property Law was in force. So that upon the death of James H. Givens, his widow became entitled to a third interest for life of all property of which her husband died seized. This is rendered apparent from an examination of the act regulating descent of real estate, enacted January 16th, 1863, which was in force at the date of the death of James H. Givens. Neither the husband or wife inherited from the other, but were entitled to their rights under the act relating to courtesy and dower.

"The provisions of this act shall in no way affect the title of a husband as tenant by the courtesy, nor that of a widow as tenant in dower." (352.)

Statutes Washington, 1862-3, p. 261-264.

Abbott's Real Property Statutes, pp. 357-377.

This act continued in force until the Act of November, 1875, which provided, among other things, "The provisions of Section 1, as to the inheritance of the husband and wife from each other, apply only to

the separate property of the decedents, and takes the place of tenancy in dower and tenancy by the courtesy which are hereby abolished."

Statutes Washington, 1875, p. 53-55.

Abbott's Real Property Statutes, p. 379.

EJECTMENT CANNOT BE MAINTAINED FOR DOWER.

The authorities are unanimous upon the proposition that before dower has been assigned, the widow cannot maintain ejectment.

It was a well settled principle at Common Law that a widow could not maintain ejectment for dower before assignment.

Doe vs. Nutt, 2 Car & P., 430.

Jackson vs. Vanderheyden, 17 Johnson, 167,

and hence her grantee could not maintain the action,

Carnall vs. Wilson, 21 Ark., 62.

Jackson vs. Dyer, 31 Ark., 334.

Jones vs. Hollopeter, 10 S. & R., 326;

even in those states where by Statute the widow has been enabled to maintain such action.

Galbraith vs. Fleming, 60 Mich., 403.

S. C. 27 N. W. Rep., 583.

Miller's Adm. vs. Woodman, 14 Ohio, 518.

She and the heirs are neither tenants in common, joint tenants or co par ceners.

Reynolds vs. McCurry, 100 Ill., 356.

Pringle vs. Gove, 5 S. & R., 536.

Nor is she a joint tenant with her husband's grantee.

Walker vs. Rand, 130 Ill., 27.

S. C. 22 N. E. Rep., 1006.

ARGUMENT ON FIRST CHAIN OF TITLE.

The deed (Exhibit "A") from Mary A. Givens to plaintiff is not the original deed, but purports to be a certified copy of said deed, from the records of the office of the Auditor of Pierce County. We call attention to the fact that the certificate appended is not attested by the seal of the Auditor.

2 Hill's Code, Section 1685, provides:

"Whenever any deed * * * shall have been recorded or filed in pursuance of law, copies of record of such deed * * * duly certified by the officer

having the legal custody thereof, with the seal of the office annexed, * * * shall be received in evidence to all intents and purposes as the originals themselves."

This, perhaps, might not be very material if it were not for the fact that plaintiff subsequently offered the original deed. When that was produced objection was made to it, that it did not appear that it was ever filed for record or recorded in the office of the Auditor of Pierce County, the county in which the premises are situated, and further, that no proof had been made of its execution. It was further objected that the deed bore on its face evidence of material alterations. These alterations are indicated on the record, page 49.

We desire to call attention to the fact that Exhibit "A," which purports to be a certified copy from the record, is not a copy of the original deed (Exhibit "B".) After the commencement of the deed—"KNOW ALL MEN BY THESE PRESENTS"—the original deed reads "That I, Mary A. Givens, of New Bedford," whereas, the certified copy reads: "That I, Mary A. Givens, widow of James H Givens;" also in the clause "Together with all and singular the tenements, hereditaments," etc., the original deed has the words including "dower and claim of dower," which is not contained in the certified copy.

It is clear that Exhibit "B" was not admissible in evidence, because being an original instrument its exe-

cution must have been proved in the same manner as deeds were proved before certified copies were admissible. We concede that if the deed had been recorded and had a certificate of the auditor to that effect, as provided by Section 204, Vol. 1, Hill's Code, that perhaps that would have been sufficient, but Exhibit "B" does not bear any endorsement of having been filed for record in the office of the Auditor of Pierce County, and there is nothing on its face to warrant the court in receiving it. Even if our objection to the certified copy, for want of the seal of the Auditor, is not considered, we submit that the plaintiff having shown that said original deed was never filed for record, then it is clear that the original deed not being evidence, a certified copy is not.

Meegan vs. Boyle, 19 Howard, 130.

Olcott vs. Bynun, 17 Wall., 44.

Besides this, the deed shows that the conveyance by Mary A. Givens was of her dower, and it also appears, from the face of the deed and from the acknowledgment, that Mary A. Givens was the widow of James H. Givens, and we think the presumption naturally arises from the facts as developed, that Mary A. Givens was only attempting to convey her right of dower.

The next instrument to which we call attention is Exhibit "C." This purports to be a decree of the Circuit Court in a partition suit between plaintiff in this action and a large number of defendants, in which the

court finds that certain parties to the suit were owners of certain distinct parcels, and among others that the plaintiff in this action is the owner of the premises in controversy.

Record, pp. 67-8.

Our objection to this deed is not based on the idea solely that it was made in an action to which defendants were not parties, but upon the ground that it was introduced as a link in plaintiff's title. Now, we are not aware that any court has the power to find title in one person, and in a subsequent action by that person against another be permitted to admit the judgment of the court as evidence of title. The court in the partition suit was not trying title, but simply dividing among a number of persons, who agreed among themselves that each was the owner of a certain undivided interest, and making that undivided interest a specific designated portion of the tract. The court below admitted it upon the theory that the plaintiff in this action obtained the interest of the other co-tenants in the premises in controversy. This may be true, but we submit that unless the plaintiff has shown that these other parties themselves had title, that he has not profited by obtaining their interests.

This decree recites a number of things which are absolutely untrue. There was no issue before the court in that case. The parties might just as well have ex-

changed deeds among themselves, and according to the court below, this in effect is all that the decree accomplished for them.

INVOCATION OF RULE OF COMMON GRANTOR.

But, notwithstanding all this, plaintiff invokes the principle that where the parties to an action in ejectment claim title from the same grantor, neither is at liberty to gain the title anterior to that of the common source. We are aware that this rule has become pretty well established, and that in the main it is a very good rule, but we submit that like every other rule, it has its exceptions. It is true that the courts have seldom been called upon to state the exceptions, but we believe that the case at bar presents circumstances which call upon this court to sustain the view taken by the court below.

We commend to the court the very able and conclusive reasoning by Judge Hanford, found on page 25 of the Record. The Supreme Court of the United States, in the case of

Blight's Lessee vs. Rochester, 7 *Wheaton*, 535,

illustrates an exception to this rule. Both parties claimed title from one John Dunlap. The plaintiffs as heirs, the defendant by purchase. The defendant, Rochester, was in possession of the premises in dispute. John Dunlap, the common source of title, was the heir of James Dunlap. "The defendants alleged and proved that James Dunlap was an alien, and subject to the

King of Great Britain. One of the disabilities of alienage was incapacity to transmit lands to heirs, consequently when he died the next of kin could take nothing by descent." Chief Justice Marshall, in delivering the opinion of the court, said: "If James Dunlap could not be considered as a citizen at the time of his death, the plaintiffs have no title, and the only remaining question arising on the bill of exceptions is, was the defendant restrained on the principle of estoppel, or any other principle, from resisting their claim," and the learned Chief Justice decided in the negative. So we might say here, Mary A. Givens never acquired any title, because she was incapable of taking, by descent, from her husband.

Another exception is where the common grantor had no claim of title or possession, and where the party invoking the rule himself claims under a quit claim deed.

Henry vs. Reichert, 22 Hun., 394.

Plaintiff's deed is a mere quit claim. Surely if she had no title, claim of title or possession, and her deed showed on its face that her title was only a right to dower, her grantee would not be estopped to deny her title, and why should a stranger?

Croade vs. Ingraham, 13 Pick., 33.

Weaver vs. Sturtevant, 12 R. I., 537.

Further, if her interest was but a right to have dower assigned, she was not an owner within the meaning of the statute, and the land was improperly assessed.

Lynde vs. Brown, 143 Mass., 337.

S. C. 9 N. E. Rep., 735.

and she was not liable for taxes assessed to the premises.

Felch vs. Finch, 52 Ia., 563.

S. C. 1 N. W. Rep., 570.

MARY A. GIVENS NOT THE COMMON SOURCE OF TITLE.

The defendants claim title under a tax deed made upon a sale of lands for delinquent taxes, assessed to Mary A. Givens. Plaintiff insists that defendants are thus brought within the rule of common source of title. We deny this assumption. While the property was assessed to Mary A. Givens the Statute provides that, * * * * "The Sheriff must make to the purchaser or his assignee, a deed of the property in fee simple, running in the name of the Territory of Washington."

Code 1881, Sec. 2934.

"A tax deed executed under this act conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned

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Code 1881, Sec. 2934.

"A tax deed executed under this act conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned

by the United States or the territory, in which case it is prima facie evidence of the right of possession."

Code 1881, Sec. 2938.

These sections mean something or nothing. If it is held that the property must be assessed to the person who is the owner, as against all the world, then the last section is useless, for, of course, if so assessed, the purchaser would obtain the absolute title. On the other hand, it is well known that the assessor acts in a ministerial, and not in a judicial capacity in making assessments.

If a list is handed to him he must assess to the person in whose name the property is listed. If no list is given, then the assessor must assess it to the owner, if known, otherwise to "unknown owner."

Code 1881, Secs. 2834, 2836, 2837.

If the assessment was the result of a judicial investigation, then the assessor would perforce, in many instances assess lands to "unknown owners," because of inability to determine who the real owner was.

We think the true construction of the law is in the first instance, to assess property to the person in whose name it is listed on the detail list. That in the absence of such listing the assessor may resort to the record of deeds, and assess it to him who has the apparent ownership. In other cases to "unknown owners."

Payne vs. Lott, 90 Mo., 676.

S. C. 3 S. W. Rep., 402.

Gee vs. Clark, 42 La. An., 918.

S. C. 8 So. Rep., 627.

The fact of assessment to a particular person does not estop that person to deny ownership of the lands, where it is sought to charge his personal estate with the amount of the tax. Surely the fact of purchase by a third person ought not to estop him to deny that the assessed person was the owner. We presume that from purposes of redemption the payment by the assessed person of the taxes would estop the purchaser to dispute the right, because under the sale, and before the period of redemption has expired, the purchaser acquires no rights except a lien on the land for the amount of the taxes, interest and costs.

Code 1881, Sec. 2928.

It is not the interest of any particular individual, but the land itself that is taxed.

Newby vs. Brownlee, 23 Fed. Rep., 320.

Brownlee vs. Marion County, 53 Ia., 487.

S. C. 5 N. W. Rep., 610.

The only consequence, perhaps, of assessing lands to one not the owner would be to exempt the owner from personal liability for the tax.

Jefferson City vs. Mock, 74 Mo., 61.

The failure to redeem works a forfeiture of all interests to the State. The State then executes a deed in the nature of a patent, which is an independent title. "A deed of the property in fee simple, running in the name of the Territory of Washington."

Code 1881, Section 2934.

As was said by the Supreme Court of Ohio in

Gwyne vs. Niswanger, 20 Ohio, 564,

"The party holding such title in proving it, goes no further than his tax deed; the former title can be of no service so him, nor can it prejudice him."

The distinction between a deed given on a judicial sale and one given on a tax sale, under our Statute, is this, that in the former case the plaintiff, holding a deed executed at a judicial sale would be compelled, in order to prove title as against a stranger, to deraign his title from the patent; whereas, in a similar action brought by the holder of a tax deed, under our Statute, the plaintiff would be required to go no farther back than his tax deed. It would not be incumbent upon him to

show that the person, in whose name the property was assessed, was in fact the owner.

We think this is the true test of whether Mary A. Givens is the common source of title.

The case of

Bonds vs. Smith, *106 N. C.*, *553*.

S. C. 11 S. E. Rep., *322*.

cited by plaintiff, is an illustration of this. The court there saying, "It does appear from the pleadings and evidence that he claims under a tax deed for the plaintiff's interest."

The *Code of North Carolina*, *Sec. 3696*, provides:

"If the delinquent * * * shall fail to redeem * * * the sheriff * * * shall execute a deed to the purchaser * * * which shall convey * * * all the estate * * * which the delinquent * * * had at the time of the sale." This statute was passed in 1872, and was incorporated in the Code of 1883.

We submit, in conclusion, that the rule of common source of title, like all rules of evidence, was designed for the purpose of promoting justice, and was not intended to conflict with the other rule that in ejectment a plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adver-

sary's. We do not think it was intended to aid a person confessedly without title, who never had possession, and is unable to prove possession in any one under whom he claims, in ousting a person who is in quiet and peaceable possession of property, especially where that person claims under a title in its nature antagonistic to that of the person claimed to be the common source of title.

Plaintiff in error has devoted considerable space in his brief to attacking the tax deed of defendants. We do not understand that this title is in issue in this case until this court shall determine that plaintiff has proved title sufficient to enable him to recover in the absence of any proof of title on the part of defendants. This is not an equity case, nor does the fact that the bill of exceptions discloses defendant's case enlarge the powers of this court. If the judgment of the court below should be reversed, the cause should be remanded for a new trial. "Sufficient unto the day is the evil thereof." When this court decides that the judgment of the court below was erroneous, it will be time enough to discuss the points urged by plaintiff as to defendant's claim of title.

Respectfully submitted,

W. C. SHARPSTEIN,

Attorney for defendants in error.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TERM, 1893.

NO. 96

A. A. WENHAM, *Appellant*,
vs.
WILLIAM S. SWITZER, *Respondent*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

C. K. Wells Co., Printers, Helena, Mont.

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In the United States Circuit Court, Ninth Circuit, for the District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
W. S. Switzer, *Defendant*.
} Citation on Appeal.

United States Marshal's Office,
State of Montana.

To W. S. Switzer, Defendant, and to Aaron H. Nelson, Solicitor and Counsel for Defendant :

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, in the Ninth Circuit of the United States, on the 16th day of January, A. D. 1893, pursuant to an appeal sued out and filed in the Clerk's office of the Circuit Court of the United States for the District of Montana, wherein A. A. Wenham is Plaintiff and Appellant, and W. S. Switzer is Defendant and Appellee, to show cause, if any there be, why judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of [seal.] the United States, this the 17th day of December, A. D. 1892.

HIRAM KNOWLES,
U. S. District Judge, Presiding.

Copy of the within and foregoing citation received this 17th day of Decemb r, A. D. 1892, and due and lawful service of the foregoing citation and appeal, mentioned therein, is accepted and acknowledged at Helena, Lewis and Clarke County, State of Montana, this December 17th, A. D. 1892.

AARON H. NELSON,
Attorney and Solicitor for the Defendant, W. S. Switzer.

Endorsements :—No. 60 : In United States Circuit Court, District of Montana, A. A. Wenham, Plaintiff, *vs.* W. S. Switzer, Defendant. Citation on Appeal. Filed Dec. 19, 1892. Geo. W. Sproule, Clerk. Word, Smith & Word, Solicitors for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

A. A. Wenham, *Complainant*,
vs.
W. S. Switzer, *Defendant*.

Be It Remembered, That on the first day of July, 1890, Complainant filed his bill of complaint in this action, which said Bill of Complaint is in words and figures following, to-wit:

In the United States Circuit Court for the District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*.

To the Honorable the Judges of the United States Circuit Court for the District of Montana, Ninth Circuit:

A. A. Wenham, who is a resident and citizen of the city of Cleveland, in the State of Ohio, brings this bill against William S. Switzer, who is a resident and citizen of the city of Butte, in the State of Montana, and thereupon your orator complains and says that about the month of April, 1888, the said William S. Switzer and your orator, the plaintiff herein, made and entered into a contract by the terms and conditions of which the said William S. Switzer was, and it was agreed by and between the said parties that he, the said William S. Switzer, was to purchase the following described lode mining property, situated and being in Summit Valley Mining District, in the County of Silver Bow, and State of Montana, and being that certain lode mining claim located and recorded in the books of records of lode mining claims in the said County of Silver Bow, as the "Burner" lode claim, and which said claim being designated as lot number two hundred and fifty-eight, by the United States Mineral Survey, and in Township three, north of range seven west of the Montana Meridian, and being designated as survey No. seventeen hundred and seventy four, and being bounded on the north by the Alta lode claim, and on the east by the Homestake lode claim, and on the south by the Silver Crown lode claim.

Your orator further represents that the said William S. Switzer was at the said time residing at the said city of Butte, in the State of Montana, and that your orator was at said time residing in the said city of Cleveland, State of Ohio, and that the said Switzer had the sole management of the negotiations for the purchase of the said property above described, and so agreed to purchase the same for the joint benefit of, and for your orator, this plaintiff, and him, the said Switzer, and that each were to have an undivided half interest in the same, and that at the said time it was not known for what

price the said property could be had, and what sum it would cost, and that at the said time your orator paid and advanced to the said Switzer on account of the said purchase, and for a portion of the purchase price thereof, and which was to be applied on the purchase of the said property, as a portion of the share of your orator therefor the sum of five hundred dollars, and which said sum the said Switzer received for such purpose.

Your orator further shows, that afterwards, to-wit, about the month of May, 1888, he, the said William S. Switzer, represented to him, your orator, that the said property could be bought for the sum of three thousand dollars, and that the half of your orator would cost fifteen hundred dollars, and that he, your orator, paid to the said Switzer the further sum of one thousand dollars on the purchase of the said property.

Your orator further shows and represents that afterwards, to-wit, about the month of June, 1888, the said Switzer purchased the said property above described and represented to your orator that he had paid the sum of four thousand dollars therefor, and that the interest which your orator would be entitled to would cost, and the same would be two thousand dollars, and that there was and would be a balance due on the same from your orator in the sum of five hundred dollars.

Your orator further shows and represents that the said William S. Switzer, in the purchase of said property above described, as aforesaid, took the title to the same in his own name and the whole thereof, and not in the name of himself and your orator, as by right of your orator he should have done.

Your orator further shows and represents that he has paid to the said William S. Switzer on the purchase of the said property the sum of one thousand and five hundred dollars, and that he had tendered to him, the said William S. Switzer, the further sum of five hundred dollars, and interest thereon at the rate of ten per cent per annum from the time the said Switzer purchased the said property and paid for the same to the time of the said tender, and that he, your orator, at the said time of making the said tender presented to him, the said Switzer, a deed for him to sign and execute to your orator, conveying to your orator an undivided one-half interest in and to the said property above described, but so it was, that he, the said Switzer, refused to sign and execute the same, and has failed to convey the said interest in the said property to your orator, but retains the same and said property to his sole use and benefit.

Your orator would further show and represent, he is now, and has been at all times, and now is ready and willing to make said payment of said sum of five hundred dollars with all interest on the same to the said Switzer.

Wherefore your orator prays that a subpoena be issued to the said William S. Switzer, requiring him to appear in said Court and answer this the Bill of Complaint of your orator at such time as is required by the rules and practices of the Court.

And your orator further prays that the said William S. Switzer be compelled by the decree and order of the Court to accept the said sum of money above named as part of the purchase price of the said above described property, and to convey, to make and execute to your orator a good and sufficient deed to the said property, to-wit, an undivided one-half thereof, and that he, your orator have such other and further relief as to the Court may seem meet and equitable in the premises, and costs of suit in this behalf expended.

ROBINSON & STAPLETON,
Solicitors for Complainant.

Endorsed :—No. 60. U. S. Circuit Court, District of Montana. A. A. Wenham *vs.* Wm. S. Switzer. Bill of Complaint. Filed July 1st, 1890. Geo. W. Sproule, Clerk. Robinson & Stapleton, Solicitors for Complainant.

And on the same day, to-wit, the 1st day of July, 1890, a chancery subpœna was issued out of this court, in the words and figures following, viz :

Circuit Court of the United States,

Ninth Judicial Circuit, District of Montana.

In Equity.

The President of the United States—Greeting :

To William S. Switzer.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the court room in Helena, on the 4th day of August, A. D. 1890, to answer a bill of complaint exhibited against you in said court by A. A. Wenham, who is a citizen of the State of Ohio: and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of [seal.] July, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the 114th.

GEO. W. SPROULE, Clerk.

Memorandum pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above

suit on or before the first Monday of August next, at the Clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

GEO. W. SPROULE, Clerk.

To which said chancery subpœna the Marshal attached his return of service, which is in the words and figures following, to-wit:

MARSHAL'S RETURN.

United States Marshal's Office, }
District of Montana. }

I HEREBY CERTIFY, That I received the within writ on the 1st day of July, 1890, and personally served the same on the 2d day of July, 1890, by delivering to and leaving with William S. Switzer, said defendant named therein, personally, at the County of Silver Bow, in said District, an attached copy thereof.

WILLIAM F. FURAY, U. S. Marshal.

Helena, July 5, 1890.

150 miles @ 5c., -	$ 7 50
3 meals, - - -	2 25
Lodging, - -	1 00
Service, - - -	2 00
	$12 00

Endorsed: (Title of Court and Cause.) Filed July 10, 1890. Geo. W. Sproule, Clerk.

And afterward, to-wit, on the 25th day of July, 1890, upon a praecipe being filed, the appearance of the defendant herein named was entered as follows:

A. A. Wenham *vs.* William S. Switzer.

The appearance of defendant Wm. S. Switzer in the above entitled action, as also the appearance of A. H. Nelson, Esq., as solicitor for said defendant, is hereby entered this 25th day of July, 1890. GEO. W. SPROULE, Clerk.

And thereafter, to-wit, on the 3d day of September, 1890, defendant filed his demurrer herein, which is the words and figures following:

In the United States Circuit Court for the District of Montana.

A. A. Wennam, *Plaintiff*, }
vs.
William S. Switzer, *Defendant*. }

To the Honorable, the Judges of the United States Circuit Court for the District of Montana, Ninth Circuit:

William S. Switzer, defendant in the above entitled cause,

demurs to plaintiff's complaint as filed therein, and upon the following ground, to-wit:

That said complaint does not state facts sufficient to constitute a cause of action.

A. H. NELSON,
Solicitor for Defendant.

I hereby certify that in my opinion the demurrer as entered above is well founded in law, and that the same is not interposed merely for the purpose of delay. A. H. NELSON.

United States of America, }
District of Montana. }

William S. Switzer, defendant in the above entitled cause, deing duly sworn, deposes and says that he has read the foregoing demurrer, and believes the same to be well taken in law, and that it is not interposed merely for the sake of delay.

WILLIAM S. SWITZER.

Subscribed and sworn to before me this 3d day of September, A. D. 1890. GEO. W. SPROULE,
Clerk U. S. Circuit Court, Ninth Circuit, Dist. of Montana.

Endorsed: (Title of Court and Cause.) Filed September 3, 1890. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 13th day of November, 1890, said demurrer by agreement of counsel was submitted to the Court, upon briefs to be filed.

And thereafter, on the 15th day of January, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

A. A. Wenham *vs.* Wm. S. Switzer.

This cause heretofore argued, and submitted to the Court for consideration and decision, upon the demurrer of defendant, to the complaint of plaintiff herein having been duly considered, *It is ordered* that said demurrer be and the same hereby is overruled.

It is further ordered that defendant have until Feb. 2, 1891, to file his answer.

And thereafter, to-wit, on the 2d day of February, 1891, defendant filed his answer herein, which said answer is in the words and figures following, to-wit:

In the United States Circuit for the District of Montana.

A. A. Wenham, *Plaintiff.*
vs.
William S. Switzer, *Defendant.* } In Equity.

Answer of the above named defendant to the Bill of Complaint of the above named plaintiff.

In answer to the said bill, I, William S. Switzer, say as follows:

First:—I do not know that A. A. Wenham, the complainant herein is a resident and a citizen of the city of Cleveland, in the State of Ohio, but I believe such to be the fact.

Second:—I admit that I, the defendant herein, am a resident and a citizen of the city of Butte, in the State of Montana.

Third:—I deny that about the month of April, 1888, or at any other time, I entered into a contract with the said A. A. Wenham, the complainant herein, by the terms and conditions whereof, it was agreed that I was to purchase the mining property known as the "Burner" lode claim and described in said Bill of Complaint as follows, to-wit: Situated and being in Summit Valley Mining District in the County of Silver Bow and State of Montana, and being that certain lode mining claim located and recorded in the book of Records of lode mining claims in the said county of Silver Bow as the "Burner" lode claim, and on which said claim being designated as lot number two hundred and fifty-eight by the United States Mineral Survey and in township three, north of range seven, west of the Montana meridian, and being designated as survey No. seventeen hundred and seventy-four, and being bounded on the north by the Alta Lode Claim, and on the east by the Homestake Lode Claim, and on the south by the Silver Crown Lode Claim.

Fourth:—I admit that at said time, to-wit: About the month of April, 1888, I was residing in the said city of Butte in the State of Montana, and I believe that the said A. A. Wenham, the complainant, was at the time residing in the city of Cleveland, in the State of Ohio; but I deny that at said time or at any other time I had the sole or joint management of any negotiation for the purchase of the above described mining property known as the "Burner" claim for the joint benefit of the said complainant A. A. Wenham and myself, the said defendant, so that each of us was to have an undivided half interest in said claim; and I further deny that at said time, to-wit, about April, 1888, or at any other time, the said A. A. Wenham, the complainant herein, paid to me the sum of Five Hundred Dollars, or that I received from him, the said A. A. Wenham at said time or at any other time the sum of Five Hundred Dollars, on account of the purchase of the said mining property or

as a portion of the share of the said A. A. Wenham in said property to be purchased under the terms of said alleged contract.

Fifth:—I deny that about the month of May, 1888, I represented to the said A. A. Wenham that the said mining property could be bought for the sum of Three Thousand Dollars, or that the half thereof would cost him Fifteen Hundred Dollars, and I further deny that the said A. A. Wenham, the complainant herein, paid me the further sum of One Thousand Dollars on account of said property to be purchased by me for the joint benefit of said A. A. Wenham and myself under said alleged contract.

Sixth:—I admit that about the month of June, 1888, I purchased the said mining property, known as the "Burner" lode claim and paid therefor entirely with money of my own, and not in whole nor in part with any money paid or advanced to me by the said A. A. Wenham at any time or for any purpose whatsoever.

Seventh:—I admit that in the month of June, 1888, to-wit: about the fifth day of said month, I advised the said A. A. Wenham that I had purchased the said mining property, that it had cost me about four thousand dollars, and that I had taken a deed therefor in my own name; but I deny that at said time or at any other time, I represented to said A. A. Wenham that he was entitled to any interest in said claim, or that the cost of said interest would be two thousand dollars. And I further deny that about the month of June, 1888, or at any other time, I represented to A. A. Wenham that there was, or that there would be a balance of five hundred dollars or of any other sum due me on account of such alleged interest of the said A. A. Wenham in said mining property.

Eighth:—I deny that the purchasing of said mining claim and the taking of the title thereto in my own name was in violation of any rights of the said A. A. Wenham to or in said mining claim, or to the title thereto, either in whole or in part.

Ninth:—I deny that the said A. A. Wenham, complainant herein, has paid to me the sum of fifteen hundred dollars on account of the purchase price of said property, and under the terms of said alleged contract, as in complainant's bill alleged.

Tenth:—I admit that on or about the month of December, 1889, the said A. A. Wenham by his solicitors, Robinson & Stapleton of the city of Butte, and State of Montana, tendered me the sum of five hundred dollars, with interest thereon from some date unknown to me, and I further admit that at the same time the same parties, to-wit, Robinson & Stapleton, presented to me a deed purporting to convey to the said A. A. Wenham an undivided half interest on said "Burner" lode claim, and requested my signature thereto, and I admit

that I refused to sign or execute said deed and have ever since refused to sign or execute the same.

Eleventh:—I admit that when about the fifth day of June, 1888, I advised the said A. A. Wenham that I had purchased said mining property, and that the same had cost me about four thousand dollars, and that I had taken a deed therefor in my own name. I advised him that I would sell him an undivided one-half interest in said claim for the sum of two thousand dollars. I admit that at that time there was in my hands five hundred dollars belonging to the said A. A. Wenham, and subject to his order, and that I advised him, the said A. A. Wenham, that if he would pay me the further sum of fifteen hundred dollars I would deed to him an undivided half interest in said mining property; that shortly after said fifth day of June, 1888, but about said month of June, 1888, I further advised said A. A. Wenham that the said payment of fifteen hundred dollars must be within thirty days of the date of my said agreement to deed him an undivided one-half interest in said mining property for the sum of two thousand dollars, and that in default of such payment within the time so limited, said agreement would be null and void. But the said A. A. Wenham made no payment under said agreement, and within the time so specified, nor at any other time prior to April, 1889, being ten months after the expiration of the full period within which my said offer of sale of June, 1888, was open to acceptance by said A. A. Wenham: that about the month of April, 1889, the said A. A. Wenham tendered me on account of said offer of sale a draft for one thousand dollars, said draft being as follows: No. 139,281, dated April 26th, 1889, drawn by the First National Bank of Cleveland, Ohio, upon the Central National Bank of New York City, payable to the order of A. A. Wenham, and endorsed in blank A. A. Wenham, but that I refused to accept the said draft as payment on account of said offer, but advised him, the said A. A. Wenham, that I held said draft, as also the five hundred dollars, in my hands and belonging to him, subject to his order, and draft and five hundred dollars has ever since and is now so held by me.

Twelfth:—Wherefore and under the circumstances herinbefore appearing, I submit that the prayer of complainant herein, that by decree and order of this Court I be compelled to accept the said sum of five hundred dollars and interest thereon, tendered me by the solicitors of said A. A. Wenham as above admitted, and that upon receipt thereof I execute to said complainant a good and sufficient deed, conveying to him the title to an undivided one-half interest in said mining property or "Burner" lode mining claim ought not to be granted, but that the bill of complaint of the said A. A. Wenham ought to be dismissed with costs, and further this defendant saith not. WILLIAM S. SWITZER.

AARON H. NELSON,
Solicitor for Defendant.

State of Montana,
Lewis and Clarke County, } ss.
District of Montana.

William S. Switzer, being duly sworn, deposes and says: That he is the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to those matters he believes to be true. WILLIAM S. SWITZER.

Subscribed and sworn to before me this 31st day of January, 1891.

[SEAL.] WM. J. BRENNEN,
Notary Public in and for Lewis and Clarke County, Montana.

Endorsed:—No. 60. In United States Circuit Court for the District of Montana. In Equity. A. A. Wenham *vs.* William S. Switzer. Answer of Defendant. Filed Feb. 2, 1891. Geo. W. Sproule, Clerk. A. H. Nelson, solicitor for defendant.

And thereafter, to-wit, on the 30th day of June, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

A. A. Wenham *vs.* William S. Switzer.

On motion the names of Word and Smith added as solicitors for plaintiff. And thereafter, on said day, to-wit, June 30, 1891, plaintiff filed his replication herein, which said replication is in words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*. } In Equity.

This repliant, A. A. Wenham, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainty and insufficiency of the answer of the said defendant, for replication thereto, saith that he doth and will ever, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this repliant.

Without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein, are hereby well and sufficient replied unto, confessed or

avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain and prove, as this honorable court shall direct; and hereby pray as in and by his said bill, he hath already prayed.

ROBINSON AND STAPLTON,
Deer Lodge City, Montana.
SAMUEL WORD AND ROBT. B. SMITH,
Pittsburg Block, Helena, Montana.
Solicitors for Plaintiff.

Endorsed:—No. 60. In the Circuit Court for the District of Montana. A. A. Wenham, plaintiff vs. William S. Switzer, defendant, *replication*. Filed June 30th, 1891. Geo. W. Sproule, Clerk. J. C. Robinson and Word & Smith and G. W. Stapleton, Attorneys for plaintiff.

And thereafter, on said 30th day of June, 1891, defendant herein filed a motion to dismiss the bill of complaint of complainant, which said motion to dismiss is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
W. S. Switzer, *Defendant*. } In Equity.

MOTION TO DISMISS COMPLAINT.

To the Honorable, the Judges of the United States Circuit Court for the District of Montana:

William S. Switzer, defendant in the above entitled cause, by his Counsel, moves that the Bill of Complaint of the above named plaintiff be dismissed, and for the reason that this Court is without jurisdiction of the subject matter in controversy, in this that the Complainant prays a decree of specific performance of an alleged contract involving only the undivided one-half interest in a certain mining claim, which said one-half interest is expressly shown by said Bill of Complaint to be of the value of Two Thousand Dollars ($2,000.00,) and no more.

Under the limitations of the Judiciary Act of 1875, 24 St., at L. p. 52, this Court is without jurisdiction in the premises.

Wherefore, defendant prays that this cause be dismissed with costs.

AARON H. NELSON,
Solicitor for Defendant.

Endorsed:—No. 60. U. S. Circuit Court, Ninth Judicial Circuit, District of Montana. A. A. Wenham *vs.* W. S. Switzer. *Motion to Dismiss Complaint.* Filed June 30th, 1891. Geo. W. Sproule, Clerk. A. H. Nelson, Solicitor for Defendant.

And thereafter, on the 13th day of July, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* William S. Switzer.

This cause came on this day for hearing upon the motion of defendant to dismiss said action for want of jurisdiction. After argument thereon said motion was submitted to the Court; thereupon said motion was denied; to which ruling defendant then and there excepted, and said exception was allowed.

And thereafter, on the 13th day of July, 1891, plaintiff filed an affidavit herein, which said affidavit is in the words and figures following, to-wit:

State of Montana, }
Silver Bow County, } ss.

John Stano, being first duly sworn, upon oath says as follows: I am well acquainted with what is known as and called the Burner Lode Claim, situate, lying and being in Summit Valley Mining District, Silver Bow County, State of Montana, and being in Park Canon, about four hundred feet southeast from Humphrey's old Arastra, and being the only Burner lode claim in said county. Said claim is described in the amended location thereof made in 1887 as being in the southeast ¼ of unsurveyed section No. 9, in township No. 3 north range 7 west. This being the same claim claimed by William Switzer, and in regard to which a suit is now pending in the United States Circuit Court at Helena, Montana, between A. A. Wenham and William Switzer. Said claim being 1500 feet in length as located, by 600 feet in width. I have known said lode claim for over four years last past, and I know the value thereof said claim for and during any time within said four years last past before the date of this affidavit has been and now is worth the sum of four thousand five hundred dollars in cash, and during all of said time one-half thereof has been and now is worth the sum of two thousand two hundred and fifty dollars in cash.

I am well acquainted with all the claims in the vicinity of said Burner lode claim and know the value thereof, and of mining property generally in said Silver Bow County.

JONH STANO.

Subscribed and sworn to before me this 10th day of July, A. D. 1891.

[SEAL.] G. W. STAPLETON,
Notary Public.

Endorsed:—No. 60. In the District Court U. S., Ninth Circuit, District of Montana. A. A. Wenham vs. William Switzer. Affidavit. Filed July 13, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 15th day of July, 1891, plaintiff filed his affidavit herein, which said affidavit is in the words and figures following, to-wit:

The State of Ohio, } ss.
Cuyahoga County, }

AFFIDAVIT OF ARTHUR A. WENHAM.

Arthur A. Wenham being duly sworn according to law, deposes and says that, at the time of the filing of the Bill of Complaint by said A. A. Wenham, against W. S. Switzer, the property in controversy in said action was then, and now is, worth more than Five Thousand Dollars ($5,000.00), and that the half interest of said Wenham in said property in said action involved was then, and now is, more than Three Thousand Dollars ($3,000.)

ARTHUR WENHAM.

Sworn to before me and subscribed in my presence by the said Arthur A. Wenham, this 8th day of July, A. D. 1891.

[SEAL] E. W. GODDARD,
Notary Public.

Endorsed:—No. 60. A. A. Wenham vs. Wm. Switzer. *Affidavit.* Filed July 15th, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 5th day of November, 1891, defendant filed his motion to dismiss said cause, which said motion is in the words and figures following, to-wit:

In the United States Circuit Court for the District of Montana.

(No. 60.)

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*. } In Equity.

To the Honorable, the Judges of the United States Circuit Court of the District of Montana, Ninth Circuit:

MOTION TO DISMISS CAUSE.

Now comes the above named defendant and by his solicitor

moves that the deposition of plaintiff taken under commission issued herein, September 7th, 1891, be rejected and the cause dismissed under the operation of Rule 69 of Equity Practice in the United States Courts, viz: "Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof, shall upon special cause shown by either party, enlarge the time; *and no testimony taken after such period, shall be allowed to be read in evidence at the hearing.*"

Replication in this cause was filed June 30th, 1891. Deposition of plaintiff was taken October 13th, 1891, and filed herein November 2nd, 1891.

AARON H. NELSON,
Solicitor for Defendant.

Service of within notice acknowledged this 5th day of November, 1891. WORD & SMITH.

Endorsed: (Title of Court and Cause.) Filed November 5, 1891. Geo. W. Sproule, Clerk.

And thereupon, on said day, to-wit, November 5, 1891, said motion, by agreement of counsel, was duly submitted to the Court for consideration and decision.

And thereafter, to-wit, on the 23d day of November, 1891, the following further proceedings were had and entered of record herein, in the words and figures following:

(Title of Court.)

A. A. Wenham vs. William S. Switzer.

This cause came on this day for the decision of the Court upon the motion of defendant to strike from the files the depositions taken by complainant, and after due consideration it is ordered that said motion be, and the same hereby is granted; and said depositions ordered stricken from the files.

And on said day, to-wit, November 23, 1891, the Court filed its opinion on said motion, which said opinion is in the words and figures following, to-wit:

In the United States Circuit Court, District of Montana.

A. A. Wenham, *Complainant*,
vs.
William S. Switzer, *Defendant*.

On Motion to Strike Depositions from Files.

ROBINSON & STAPLETON, and
WORD & SMITH,
Solicitors for Complainant.
AARON H. NELSON,
Solicitor for Defendant.

Opinion filed November 23, 1891.
GEO. W. SPROULE, Clerk.

KNOWLES, J.

The defendant moves to strike from the files the depositions taken on the part of complainant in the above cause, because not taken within three months after issue was joined therein.

There seems to be no dispute but that the deposition was not taken within three months after that date. The cause is one in equity. A portion of rule 69, in equity prescribed by the Supreme Court, reads:

"Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing."

It seems under the decision of Fisher vs. Hayes, 12 Blatchford, 25, when proofs are not taken in proper time, they may be filed under certain conditions *Nunc pro tunc*. But no motion of that kind has been made in this case, and I do not know that the extenuating causes which would allow this exist. Under the above rule there seems no discretion in this court but to grant the motion of defendant.

It is therefore granted and said depositions are hereby stricken from the files.

And thereafter, to-wit, on the 29th of April, 1892, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

Ordered that said cause be tried before the court and cause ordered set for trial May 26th, 1892.

And thereafter, on the 26th day of May, 1892, the following further proceedings were had, and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

This cause heretofore set for trial this day came on regularly for trial before the court, and thereupon George W. Stapleton and A. A. Wenham sworn as witnesses on behalf of complainant, and documentary evidence introduced, and thereupon further trial of this cause continued until May 27th, 1892, at 10 a. m.

And thereafter, to-wit, on the 27th day of May, 1892, the fol-

lowing further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

Counsel for respective parties present as before, and trial of cause resumed. Thereupon A. A. Wenham, recalled as a witness and documentary evidence introduced, and thereupon Wm. S. Switzer sworn on behalf of defendant, and thereupon evidence being closed, argument of cause continued until June 7th, 1892.

And thereafter on the 7th day of June, 1892, the following further proceedings were had and entered of record herein:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

Counsel for respective parties present and argument of cause resumed, and thereupon cause submitted to the court for consideration and decision.

The evidence taken in said cause, and all exhibits filed therein being in the words and figures following, to-wit:

Mr. Stapleton called, sworn and examined on the part of the plaintiff, testified as follows:

Examination by Mr. Smith—

Q. Mr. Stapleton, you are one of the solicitors—attorneys for Mr. Wenham?

A. Yes, sir.

Q. You are acquainted with Mr. William S. Switzer?

A. Very Well.

Q. You may state whether at any time you made to Mr. Switzer a tender of any money for and on account of Mr. Wenham with reference to an interest in the Burner Lode Claim?

A. A short time before the commencement of this suit, and before the bringing of it, the date I do not remember, I went to Mr. Switzer at Butte City, to tender him $500, with interest thereon computing from 1st of June, 1888, but not knowing the exact time it ought to be computed from I tendered him about $60 more, knowing pretty well he would not receive it; so that there should be no question about it, and I tendered him $50 over and above that, and $150 over and above that amount.

Mr. Nelson—That is just the testimony I object to. It is not set out in the complaint. The bill distinctly states that the tender was $500 and interest.

The Court—He says, tendered that to him with interest, but there seems to be some dispute as to when the interest would commence to run.

Witness—I calculated the interest from about the 1st of June; I think, from the 1st of June, 1888, and not knowing whether that would be sufficient I tendered $60 more, so as to be sure to cover what the interest might be.

The Court—What is that $150 for?

A. It was for one-half the cost of patenting. It was over one-half I tendered so as to give more than it would be. Mr. Switzer claimed that he had been at some expense for proceedings to patent his ground, and I tendered him for Mr. Wenham $150, Mr. Wenham's half of the first expense.

The Court—That would not be competent. Objection sustained.

Mr. Smith—The next point is that this tender was for the purchase price and interest.

Mr. Nelson—We admit that.

Mr. Smith—Now sir, at that time did you offer him a deed to sign?

A. Yes sir. (Witness is handed paper.) I offered him first what is known as a bargain and sale deed. I have it in my hand.

Bargain and sale deed offered in evidence as Plaintiff's Ex. 1.

(Witness continues.) I asked him to sign it and he refused, and so there might be no question I offered him for the same property a quit claim deed and asked him to sign it, which he refused to do. Do not remember at that time that I had any conversation with Mr. Switzer about balance of purchase money—I do not remember that I did. I do not remember that we had much conversation at that time; it has been some time ago.

Quit claim deed offered in evidence and marked Plaintiff's Ex. 2.

Witness excused.

Court adjourned until 2 o'clock p. m.

2 p. m. May 26.

Mr. Wenham called, sworn and examined on the part of the plaintiff, testified as follows:

Attorney for defendant objects to introduction of this testimony. It is admitted that these parties have never seen each other; the entire contract, if there was any, grew out of correspondence and has been conducted by correspondence. It is a case of documentary evidence entirely.

Mr. Smith—There are some questions I desire to ask the witness.

Objection overruled.

Q. You are the plaintiff in the case, are you, Mr. Wenham ?

A. Yes sir. Am not personally acquainted with Mr. Switzer. As to the relations existing between Mr. Switzer and myself prior to correspondence relating to Burner Lode Claim, about which this suit is brought, in the latter part of 1886 we had correspondence relating to the Monitor tunnel. Correspondence very friendly; so much so that I used to send papers; also sent the Mining Journal. Both interested as co-owners in said claim, Monitor Tunnel.

Q. I will ask you to state, Mr. Wenham, whether or not this is a letter received by you from Mr. Switzer; is that letter received by you from Mr. Switzer ? (Hands witness letter.)

A. Yes sir.

Q. This is a letter dated October 2, Butte City, Montana, 1887, addressed to Mr. A. A. Wenham. The first part of it is in relation to their Monitor Tunnel business. I will not read it unless the Court desires it—"Mr. Wenham, if you have a friend who desires one-half of a good claim lying alongside of the Alta Lode, which I think can be got for $1500, I wish you would let me know. Some time ago I bought one-half of it. It cost him about $2000. He is not a miner. The ground is a softer formation than where I am running our tunnel and can be worked very easy. It is sloping toward the creek, and adjoining, so the ores can be all run from it, and all concentrated through our concentrator. It slopes north to our south line of the Alta, while our grounds slope south; so sloping together it is cheap, I think. Two large veins run lengthwise through it east and west. Same course of ours; and please let me know. From now until spring is the time to pick up property cheap. If you think a sale can be effected I will send you a copy or plat of it, as it lays adjoining our grounds, the Alta Lode Claim. Then any one can come out, or I will get a deed of it in the bank and the exchange can be made either way. And I will get it cheap

as any price can be had for it. Yours in confidence, William S. Switzer." That is all with reference to that part of the letter referring to this matter. Now, Mr. Wenham, I will ask you whether or not you made any reply to that?

A. As far as I remember I asked him for a further description of it, and what it could be got for.

Mr. Nelson—I was duly served with notice to produce letters, and I suppose Mr. Switzer, who has not yet arrived, would produce those I have not. I have no letter that the plaintiff alleges is in answer to this.

Witness excused.

Court adjourned until 10 a. m., Friday, May 27.

Owing to the absence of witnesses case adjourned until 2 p. m. Friday, May 27th, 1892.

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2 p. m.

Mr. Nelson.—As this case clearly rests upon documentary evidence entirely, the plaintiff and defendant having met to-day for the first time, it certainly would not be competent to produce any parole evidence, except to sustain the documentary evidence, and I would ask the Honorable Court to rule in this way in regard to this matter; that the letters which have passed between these parties upon which the contract rests be first produced, and to this effect both plaintiff and defendant can be sworn that these are all the letters that either of them have received pertaining to this matter; that these letters be presented to the Court, and if the Court finds any hiatus, and desires other evidence which is competent, to introduce parole evidence.

The Court. As this case stands, the contract would have to be proved in writing, but independently of this evidence and so on, can be proved by parole before the letters are produced.

Mr. Nelson. After parties are on the stand and sworn that these are all the letters that passes between them, then as we read these letters that the court select only such parts which are competent and as to any difficulty in establishing the case either on part of the plaintiff or defendant that the Court rule.

The Court. You admit that all letters these parties introduce here were letters that were written by the defendant?

Mr. Nelson. We admit that.

The Court. Proceed and read your letters.

Mr. Wenham recalled and testified as follows:

I read on yesterday letter dated Oct. 2nd, 1887, from Mr. Switzer to yourself; about what time did you receive that letter dated Oct. 2nd, Butte, Montana?

A. I should think about four days. Answered that letter in October; did not keep any letter press copy of letter; know from recollection; answered that letter prior to 15th day of March, 1888. As far as I remember my answer was to the effect that I inquired further about this property, and also about the Monitor Tunnel, but I do not think I made any direct acceptance at that time.

Q. Here is a letter written again by Mr. Wenham on the 15th of March, 1888, and I will read that part referring to this question. "I want to go in with you. Could the interest be bought for $1,000.00? Friend Whitney will be out to see you soon, I think. We could work the claim after the Monitor was well under way. I suppose you would be in no hurry to develop that claim until after the tunnel was complete. I hope you will be successful in getting the Sunlight. That is all I believe in that letter that refers to that claim. This seems to be an answer from one from Mr. Switzer dated the 7th day of March. Mr. Switzer wrote the 7th day of March. It reads: "In relation to the claim I wrote you the Colorado party owner was out. I think he will sell or will incorporate this year." That is all, and this letter I just read was the answer to it, in which Mr. Wenham asks: This letter No. 8 is marked Ex. 4, also letter A marked Exhibit 5. I will read (reads from Ex. 6) "Before the weather gets too hot—Hope you will be able to secure the Sunlight west before it gets too hot—that is not in relation to this property—before it gets too late if you should get the claim adjoining the Alta all right. There is no hurry, as we could not work it for some time to come." This claim adjoining the Alta is the one. We file this as Ex. 6. Next letter appears to be in answer to letter of Mr. Wenhams of the 26th—of this one just read. "Butte City, April 13th, 1888. Yours of the 26th (which is the one just read.) In relation to the interest nearest the Alta it can't be had for less than about $1,500.00, if it can be bought at any price, but I shall know in about 20 days, and I will write you soon as I can get to let you know what I can let you have it for. He may get excited and ask more. Mining property is changing hands here now, and a little anxiety shown now, but nothing surprising yet. One thing more, if you conclude to take the interest you better send $1,500.00 to the First National Bank of Butte. As if you wait it may slip in others hands. I am good for all you send to me." That letter is signed by Mr. Switzer, and is marked letter No. 2 now Ex. 7. Here is one that appears to be written before that. "How about the

claim adjoining the Alta claim. Can you secure the one-half you spoke of. Let me hear from you as soon as possible." This is from Ex. 8. Letter dated April 23d, in answer to this one. "Yours of the 13th at hand and contents noted. According to your wishes I enclose you $500.00, payable to your order. This is a New York draft, and is as good as gold at the First National Bank in your city. In fact the banks prefer drafts to currency. Now if you go quietly to work and not let the parties who want to sell get excited, when he agrees to sell give him $500 to bind the bargain, and you can telegraph me for the other $1,000.00, which I will send immediately on receipt of notice, and if you can't buy all of his interest buy half of it." In regard to the claim next the Alta please keep it confidential until something is done; and, by the way, what is the name of the claim?" That is dated the 23rd of April, 1888. That is the one in which the first money was sent by Mr. Wenham (Ex. 9.) In answer to that, on April 28th Mr. Switzer wrote this letter: "Yours of the 23rd, 1888, is received, with one check of $500.00 on the First National Bank of Cleveland, Ohio. The mining lode claim is known as the Ontario, or Burner Lode Mining Claim. Soon as I can hear from the party the matter will be concluded. The money is in bank." (This letter marked Ex. 10.) Here is one written May 26th, from Mr. Wenham: "My Dear Sir—Yours of April 28th at hand acknowledging receipt of check for $500." That is all it is. That was May 26th. On June 5th Mr. Switzer writes this letter: "In relation to the Burner mining property I have got it all and paid for it, and surveyed it for a patent, but am doing $100.00 worth of work, so as to have over $600 worth of work, which will be a necessary improvement. I am sure of two veins on the ground; but it cost more than $1,500. It all cost me about $4,000, all told, but I was determined to have it if it cost more. It will pay to hold when patented. Property is rising in Park Canyon. Under the circumstances I had to take a deed in my own name, and of course had to pay for it on the delivery of the deed, and came near losing it at that. Others would take it at higher figures. Now friend A. A. Wenham send me $1,500 and I will make you a deed of one undivided one-half of the entire Burner property, free of all work, excepting the one hundred which I am now doing, which work will be over $600, sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which is only the regular price in this district and territories. As I have received $500 of you, so the balance, $1,500, will make the purchase money of your part $2,000. I will write you more in detail next letter." That is all he says about that. Did you write anything further to the defendant after this letter I have just read?

A. I think shortly after that time I wrote him in detail asking for plat and a description of the property he spoke of in letter No. 1, and other points of interest which required to be known in buying

the property. Did not get any more letters after June 5th from Mr. Switzer. He said he would write in detail—until about six or seven months after.

Q. And this letter, No. 5, May 30th (Ex. 14), 1889, is the next letter you received?

A. Yes sir.

Q. I will now read No. 5 (Ex. 14), May 30th, 1889. This seems to have been an answer to one No. 6, No. 6, 1889. No—April 6th, 1889 (Ex. 13). It says: "Not having heard from you since some time last April or May I have felt as though you had rather neglected my last letter, written to you some time in the early part of June last. However, as you are the senior I accept the situation. I enclose check on New York for one thousand dollars. Please let me know how much you figured to be the balance. You now have $1500 in total from me. I have thought it quite strange that I had not heard from you. However, I supposed you would write when you were ready. But as it was a matter of business I thought it my duty to write to you now as time was drawing close. I hope you are enjoying good health," etc. That seems to be all in reference to this. This is the letter of April 6th, 1889, enclosing $1000 and asking why he had not heard from him, etc. We will file that marked Ex. 13: On May 30th, answering "Your note of April 6th, 1889, containing one check for one thousand which I deposited in the First National Bank for safe keeping until you call for it. Also your five hundred check is in the bank subject to your order. Now the best investment I can make with the money for you is in the Monitor property, which I think will be safe. By your request and Mr. C. W. Pomeroy's request I will make you a deed for 1500 shares of the Monitor, shares at one dollar per share. I can't make you any deed to or in the Burner ground." That is all, I believe, in relation to that. This letter is marked Ex. 14.

Q. I will ask you this further, this check for $1000 which you sent, was that at any time returned to you?

A. It was.

Q. What time, Mr. Wenham?

A. It will tell you, I think, in a letter there. It was returned to me with the check for $500 by Mr. Nelson on May 25th, 1891, I think, after I brought the suit. I returned them.

Q. State whether or not since that time the checks have been returned to you as paid.

A. They have.

Q. By whom is it endorsed ?

A. William S. Switzer.

Cross-Examination by Judge Nelson—

Q. Mr. Wenham, you testified that in answer to this first letter of Mr. Switzer, dated Oct. 2d, 1887, you wrote asking making some inquiries as to the character of the claim adjoining the Alta. Did you at that time understand the claim to be the claim now in controversy, the Burner Lode Mining Claim?

A. Yes Sir. Understood it so because he said it was adjoining the Alta; there are other claims adjoining the Alta,—in close proximity—not east and west Sunlight. There were other claims adjoining, I think the Sunlight does not adjoin the Alta.

Q. How then did you connect this indefinite proposition to dispose of half interest to some friend as in the letter of Oct. 2nd, with this Burner lode claim ?

A. In letter No. 1 you will see the property described by Mr. Switzer. Prior to letter No. 1 think I had some knowledge of claim from Mr. Pomeroy. Letter No. 1 describes it also. I will tell you how I know, that I replied to this letter of Oct. 2nd, some time in the same month in which it was written; as a rule I never allow a letter to go unanswered, especially a letter of that nature, and I am very sure that I answered the letter: did not keep copy of letter.

Q. You kept no copies of any of the letters in connection with this transaction ?

A. No. The transaction is an isolated one from my business, but I remember it very distinctly. Though it is five years or more from the time when this letter was written I am almost positive because this case was commenced some two years ago, was started; at that time my memory was refreshed; previous to the institution of this suit. My memory was refreshed and I would remember very nearly what I had answered. I am almost positive that I answered that letter.

Q. And that the contents of your answer was so far as this claim was concerned, in the nature of a general inquiry as to what this claim adjoining the Alta was ?

A. That is my general recollection. Was at that time and since engaged with Mr. Switzer the defendant in this case in connection with the Monitor Tunnel property. These letters which have been produced in Court did at times contain inquiries regarding east and west Sunlight claims. Mr. Pomeroy thought the syndicate

ought to buy these properties, and there was a party thought of taking hold of them, but they were held at such high prices they could not be got.

Q. Why are you so positive that in 1888, in October, 1887, you replied to this first letter of the defendant making a possible proposition that he might buy a half interest for some friend, that you replied to that especially inquiring in regard to this claim, when you were constantly sending letters making inquiries in regard to other claims?

A. I had a great deal of confidence in Mr. Switzer, and he represented that this half interest was very cheap.

Q. This letter Ex. A (Ex. 5) is your letter to him, dated March 15th, 1888, in which you make an inquiry like this: Here are your words. "Now about the claim adjoining the Alta. I want to go in with you. Could the interest be bought for $1,000.00?

A. That is right.

Q. Now you said under oath that in October, 1888, you made a similar inquiry?

A. I made inquiries about the properly I am pretty sure.

Q. You cannot swear then that prior to the date of March 15th, 1888, you made no positive inquiry in regard to this property in answer to Mr. Switzer's letter of October 2nd?

A. I am almost positive I inquired about the character of the property.

Q. At the same time you were writing general letters in regard to these properties.

A. I answered his letters substantially point for point. Did not keep copies.

Q. So far as these letters that have been produced are you aware of any other letter of yours that has not been produced by the defendant except this alleged answer to letter of October 26th?

A. I cannot say as to that. Do not know positively as to whether all letters that ought to be here relating to this—my letters.

Q. Except one that you say was an answer to his of October 2d.

A. I would not say; we were writing possibly right along, in regard to this matter. In direct examination I testified that in answer to a letter from the defendant dated June 5, 1888, making a specified offer to me of this property—of the half interest in it—for

a specified sum—that I replied to that letter very soon after, about that time. Do not think you have produced that letter. Am so sure that I answered this letter of defendant's dated June 5th because it required an answer. I forget the substance of the letter you speak of.

Q. I am speaking of your alleged answer to the defendant's letter of June 5th, 1888, in which he did make a specified offer of a deed to one-half interest in this property to you for the sum——

A. I remember. I think about that time I wrote Mr. Switzer asking him for full description and plat, as he had promised to give me, stating particulars of the case, and such information as he had agreed to give in letter No. 1; I think you will find it there. Wrote him in answer to his letter of—marked No. 1—asking for further details.

Q. In his letter of June 5th, produced here, he makes a specified offer.

A. About that time, I think, I wrote him asking for full description.

Q. I will read.

Q. I will read a letter here, June 4th (Ex. 15.) This letter is a letter that crossed in the mail, evidently the defendant's letter of June 5th. "Mr. C. C. Frost is in trouble, and wants $500 to carry on his suit. He is willing to give deed of his interest in Sun Light as security for the $500 for three or four months, the deed to be put on record. Now friend Switzer, if you think Mr. Frost can give a good deed as security and you think best and safe to loan him the money you can give him the $500 I have in your care, and I will send you more to take its place. I would get his note also his deed. Is it necessary for his wife to sign the deed in Montana? Have same put on record. Would it not be best for you to have your lawyer fix up the loan? The money I have with you might as well be drawing interest. What is legal rate of interest in Montana? If anything should happen that Mr. Frost could not meet his obligations his claims would not fall into stranger's hands." Your letter of June 4th apparently crosses Mr. Switzer's letter of June 5th. What was the outcome of that propositlon to loan $500.00?

A. Mr. Frost got into trouble,—it was not loaned I believe. Do not know how long after this letter of June 4th was written that it was decided not to loan this $500 to Mr. Frost; I know that Mr. Frost did not get the money from Mr. Switzer. I loaned Mr. Frost myself $500.00; sent it to him.

Q. Did you ever write to Mr. Switzer after this letter of June

4th, 1888, in regard to your proposition, anything more in regard to this $500.00.

A. I think not. I understood from outside parties that Mr. Switzer refused to loan the money, too—I heard it.

Q. You directed him to loan to Mr. Frost, and yet you had no further correspondence as to this $500.00?

A. That $500 was sent to Mr. Switzer to secure this claim. Would have replaced it.

Q. But the question I now ask you is, did you not correspond with Mr. Switzer in regard to this contemplated loan, $500, to Mr. Frost?

A. I may have written him, but I loaned the money myself; gave N. Y. draft to Mr. Frost, having heard Mr. Switzer would not loan it. Did not write to Mr. Switzer about this loan, that I know of; had no reason to; Mr. Switzer did not care to loan Mr. Frost the money. Ascertained that through a third party.

Q. And then from that time until the next April or May, ten months or more, you said nothing more to him about this $500 you told him to loan?

A. I wrote him, I think, asking if he had secured the claim. Do not remember when it was. In answer to this letter of June 5th, wrote to Mr. Switzer asking for further information in regard to the claim—asking for plats, etc.

Q. Then that letter must have been written after his letter of June 5th.

A. I think it was written after.

Q. I have here a letter of yours, April 6th, 1889; this is about nine months after Mr. Switzer's letter of June 5th making you definite proposition for half interest. "Not having heard from you since some time last April or May, I had felt as though you had rather neglected me." How do you account for that statement when you had Mr. Switzer's letter of June 5th?

A. I cannot tell you, I may not have recollected the date. As to receiving letter from him dated June 5th, 1888, and this letter saying had not heard anything from him since April or May; also that in answer to his letter of June 5th, I wrote asking for further details, will tell you how I can account for that. I probably did not get the letters out and look them over; that is the only way I can account for that. Know I sent letter in June, 1888, in answer to Mr. Switzer's letter of June 5th, because it was getting pretty late. He had been negotiating with these gentlemen and wanted to buy

this interest, and I had not heard from him for some time. Know on this date, 27th of May, 1892, that I answered Mr. Switzer's letter of June 5th, 1888—as near as I can recollect it was about that time; I am pretty positive that I asked him, as I said before, for description and plat of the property. I think you will find that letter on file somewhere.

Q. This letter of yours agrees with the record, because you say you have not heard from him since April or May. Does not that agree with the record? "I have felt as though you had rather neglected my last letter written to you sometime in the early part of June last. However, as you are the senior, I accept the situation. * * * * * Let me know how much you figured to be the balance." This letter is dated some nine months after you received the letter from him in which he positively stated what the balance was. Why did you ask him?

A. I asked him for survey and plat, as he agreed to give me in his letter No. 1. Asked him how much he figured the balance was, because I thought there was some patenting and some assessment work and some other details. Almost positive that I wrote letter in answer to letter of June 5th. I kept no copies of my letters; I should have done so.

Q. If you wrote such a letter, are you certain that you posted it?

A. Positive. Posted it right at the side of the desk where they are put usually. Use stamped envelopes. Addressed it Wm. S. Switzer, Butte, Montana. To the best of my recollection these are the facts.

Q. Now in this letter in which you say that you have not heard from him since April or May, and enclose him $1,000, and ask what further amount is due, why did you send $1,000, when in the letter of June 5th. 1888, he told you you must send $1,500.00?

A. I, sent $1,000.00 expecting to get a reply telling me how much the balance was. He had told me the purchase price was $1,500—the balance of the purchase price, but there was some patenting I understood and some assessment work and some other items had to be paid for.

Q. You do not get my question; why when Mr. Switzer made you a proposition to deed you an undivided one half interest in this Burner lode claim if you would send him $1,500, he stating that he had in his hands at that time $500 belonging to you, why did you, nine months after, send him only $1000, if the $1,500 was due, and then there was some patenting and expenses besides that in addition to the $1,500?

A. That is very true.

Q. Why send him only $1,000 when he called for $1,500?

A. I sent $1,000 as I would to any one else, and wanted full amount of the balance which I would send a check for—a draft. He says I think that $1,500 would be the balance but there would be some other expenses; if you will read that letter further.

Q. I will read from the copy. "Now friend A. A. Wenham send me $1,500 and I will make you a deed of one undivided one-half of the entire Burner property and free of all work excepting the one hundred which I am now doing, which work will be over $600 sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which is only the regular price in this district and territory."

A. Yes I did not know what the price was.

Q. This letter of June 5th, 1888, you replied to under date of April 6th, 1889, and yet did not know how much you were to send him?

A. Yes Sir.

Q. Did you not know, Mr. Wenham, that you were to send him $1500 as the price of the property besides?

A. Yes: that is very plain.

That is all.

Re-direct examination by Mr. Smith—

Q. Mr. Wenham, when you wrote this letter of June 4th, 1888, asking Mr. Switzer to let Mr. Frost have that $500 at that time, did you know Mr. Switzer had used the $500 in the purchase of this property he was negotiating for?

A. The property had not been purchased at that time.

Q. You did not know until you received this letter of June 5th.

A. I do not think I did.

Q. In your letter you say you will immediately replace the $500 in his hands?

A. Yes sir.

Q. And afterwards you learn that he did not let Mr. Frost have the $500, and let him have it yourself?

A. Yes, the June 5th letter winds up and says, "I will write soon more in detail," but I never got any answer to it.

Q. You are a citizen of the State of Ohio, City of Cleveland ?

A. Yes sir.

That is all.

Plaintiff rests.

Mr. Switzer, called and sworn on the part of the defense, testified as follows:

Direct examination by Judge Nelson—

Q. Mr. Switzer, you are defendant in this case?

A. Yes sir.

Q. You heard Mr. Wenham testify as to having sent you a reply to a letter of yours, dated Oct. 2d, 1887, in which you said that there was a claim adjoining the Alta that you thought you could get a one-half interest in it for some friend of his: did you ever receive such a letter.

A. Never received any such letter. I could not find any such letter, and do not believe I ever had any such a letter.

Q. According to the best of your recollection then this letter of March 13th, 1888, from Mr. Wenham, is the first letter that you received from him in regard to this property, after that letter of yours of October 2nd, 1887, is it?

A. Yes, sir.

Q. By your letter of April 28th, 1888, to Mr. Wenham, you acknowledge the receipt of $500 by check on the First National Bank of Cleveland, Ohio. In the letter in which Mr. Wenham transmits that he says: "According to your wishes I enclose you $500 payable to your order. This is a N. Y. draft, and is as good as gold at the First National Bank in your city." As there is nothing in your letter as to what that $500 was on account of, what did you do with that $500?

A. I took the check—the draft I think it was—and put it on deposit in the First National Bank and notified him in one of my letters. In my reply to that letter told him he could get an interest possibly at that time; did not know how much it could be bought for, but if he did not want to be left he must send me $500; this $500 was not in answer to my call for $1,500.

Q. And for that reason you put it in the bank, did you?

A. I put the checks in the bank.

Q. Now Mr. Switzer in the pleadings you swear that after the

A. That is very true.

Q. Why send him only $1,000 when he called for $1,500?

A. I sent $1,000 as I would to any one else, and wanted full amount of the balance which I would send a check for—a draft. He says I think that $1,500 would be the balance but there would be some other expenses; if you will read that letter further.

Q. I will read from the copy. "Now friend A. A. Wenham send me $1,500 and I will make you a deed of one undivided one-half of the entire Burner property and free of all work excepting the one hundred which I am now doing, which work will be over $600 sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent. which is only the regular price in this district and territory."

A. Yes I did not know what the price was.

Q. This letter of June 5th, 1888, you replied to under date of April 6th, 1889, and yet did not know how much you were to send him?

A. Yes Sir.

Q. Did you not know, Mr. Wenham, that you were to send him $1500 as the price of the property besides?

A. Yes: that is very plain.

That is all.

Re-direct examination by Mr. Smith—

Q. Mr. Wenham, when you wrote this letter of June 4th, 1888, asking Mr. Switzer to let Mr. Frost have that $500 at that time, did you know Mr. Switzer had used the $500 in the purchase of this property he was negotiating for?

A. The property had not been purchased at that time.

Q. You did not know until you received this letter of June 5th.

A. I do not think I did.

Q. In your letter you say you will immediately replace the $500 in his hands?

A. Yes sir.

Q. And afterwards you learn that he did not let Mr. Frost have the $500, and let him have it yourself?

A. Yes, the June 5th letter winds up and says, "I will write soon more in detail," but I never got any answer to it.

Q. You are a citizen of the State of Ohio, City of Cleveland?

A. Yes sir.

That is all.

Plaintiff rests.

Mr. Switzer, called and sworn on the part of the defense, testified as follows:

Direct examination by Judge Nelson—

Q. Mr. Switzer, you are defendant in this case?

A. Yes sir.

Q. You heard Mr. Wenham testify as to having sent you a reply to a letter of yours, dated Oct. 2d, 1887, in which you said that there was a claim adjoining the Alta that you thought you could get a one-half interest in it for some friend of his; did you ever receive such a letter.

A. Never received any such letter. I could not find any such letter, and do not believe I ever had any such a letter.

Q. According to the best of your recollection then this letter of March 13th, 1888, from Mr. Wenham, is the first letter that you received from him in regard to this property, after that letter of yours of October 2nd, 1887, is it?

A. Yes, sir.

Q. By your letter of April 28th, 1888, to Mr. Wenham, you acknowledge the receipt of $500 by check on the First National Bank of Cleveland, Ohio. In the letter in which Mr. Wenham transmits that he says: "According to your wishes I enclose you $500 payable to your order. This is a N. Y. draft, and is as good as gold at the First National Bank in your city." As there is nothing in your letter as to what that $500 was on account of, what did you do with that $500?

A. I took the check—the draft I think it was—and put it on deposit in the First National Bank and notified him in one of my letters. In my reply to that letter told him he could get an interest possibly at that time; did not know how much it could be bought for, but if he did not want to be left he must send me $500; this $500 was not in answer to my call for $1,500.

Q. And for that reason you put it in the bank, did you?

A. I put the checks in the bank.

Q. Now Mr. Switzer in the pleadings you swear that after the

5th day of June, 1888, at which time you wrote Mr. Wenham a letter offering to deed him an undivided one-half interest in this claim if he would send you $500, and also said that you would write more in detail. You have sworn that you did write him a letter after that time, and told him he must send you that money within a specified time or the agreement would not stand?

Objected to. Objection sustained.

Q. I will ask, did you after June 5th, 1888, write any other letter to Mr. Wenham in regard to this Burner Lode Claim?

A. I do not remember that I did. After June 5th, the letter in which I say I would write him more in detail, I wrote a letter in detail somewhat. It was several days after letter of June 5th, 1888, to the best of my recollection, that I wrote letter that I agreed to write him. I do not remember; I was very busy and thought I would take several days to think over the matter; then I wrote him. It might have been four or five days or a week; I do not remember the number of days; wrote him within a month.

Q. State now about what was the substance of that letter written after your letter of June 5th, 1888?

A. I stated to him that I had furnished my own money, what money I had in my hands of his—I did not feel I had a right to pay it out and the property was offered to me—I wrote after June 5th, and in detail as I had promised him.

Q. Now what did you say in your letter, the letter of June 5th?

A. I told him I would make him a deed if he would send me $1,500.00 he had $500 in my hands, which would make it $2,000 that is the substance of the matter. After the June 5th letter I wrote that letter in detail I had promised. In substance I said in that lettter that I would make a deed.

Q. Did you tell him that the money must be paid?

Objected to.

The Court. If he can remember what was in that letter he may reply to that.

Q. After June 5th, 1888, in which letter you say you will sell him this claim, "I will write you more in detail" did you write him more in detail?

A. Yes Sir. The substance of that letter more in detail, was in relation to the price I put on the—that was the substance of the matter. Heard Mr. Wenham testify to the fact that he wrote me

again after this letter of June 4th, in which he directed me to loan $500 to Mr. Frost; testified that he wrote me again asking for further details in regard to the price of the Burner lode claim, but I do not remember that I ever received any such letter. He wrote me some letters in relation to the west Sunlight—I do not remember that there was anything in relation to the Burner claim I do not think, as I remember that he knew the name of the Burner lode claim then. The $500 was never loaned to Mr. Frost.

Q. It was not loaned to Mr. Frost by you? Did you write again to Mr. Wenham in regard to loaning this money to Mr. Frost?

A. I told Mr. Frost—I believe I wrote to Mr. Wenham in relation to it. In regard to what I wrote to Mr. Wenham I told him Mr. Frost had requested me to loan him $500 which I had of his money, and I said I would write to Mr. Wenham about it, and before I got an answer, I think it was a month or two or thereabouts, I heard from another source that Mr. Wenham had loaned Mr. Frost some money. I never received any letter from that time on until I received the draft. When I received the $1,000 draft which Mr. Wenham sent me I wrote him I could not get the interest in the Burner lode claim for him because when I had the opportunity to buy the property I did not consider the money was mine which I had in my hands; I furnished my own money. I had to get it on short notice or other parties would have taken it, and I made up my mind to take it in my own name: pay for it myself and settle with Mr. Wenham on the proposition if he saw fit to take it after that; if not I would keep it myself. Mr. Wenham sent me $1,000.00.

Q. Why, after having made Mr. Wenham an offer of an undivided half interest in this Burner lode claim in June 1888, when he sent you $1,000 in 1889—why did you refuse to receive it on account of this purchase?

A. It had been so long a time that I made up my mind that he had forfeited all right and I did not consider I was under any obligations—according to the proposition I sent him.

Q. What proposition was it you sent him?

A. If he would send me $1500, with what I had, I would make him a deed to one-half of the Burner Lode Claim, and considered he was good for the preliminary matters, such as patenting, expenses, etc. Nine months after, when he sent me this money, I did not receive it, because I thought he had been waiting so long to see if the property would raise in value, and I took it as an insult. He waited so long keeping me out of my money, not answering my letters, and I felt as though he was waiting to see if the property was growing in value.

Q. Why did he not have a right to wait?

Objected to and overruled. Ex.

Q. Why did he not have a right to wait nine months?

A. The proposition was for thirty days, I think. I think I made that proposition for thirty days after the letter of June—I forget the date of it.

Q. After that letter of June 5th you made a proposition that he must——

Objected to, because witness has not told any such thing.

Q. Did you at any time make a proposition to Mr. Wenham that payment must be made within any specified time?

A. Yes sir. To the best of my recollection that proposition was made by letter. It was made after my letter of June 5th, 1888, in which I told him the round figures. I remember that I wrote him making a proposition that this money must be paid within thirty days, because I think I had a copy of the letter.

Objection to the introduction of any oral statement, and move it be stricken out. It is incompetent.

Q. He thinks he had a copy, have you such a copy now?

A. I could not find it among my papers; have looked for it thoroughly. I think after my letter of June 5th, 1888, I wrote another letter, as I have just testified to, telling Mr. Wenham that he must pay this money within thirty days. I swear to that fact, because I thought he was a monied man, as I understood, and I thought there ought to be some stated time when the matter could be settled. Thought it would be business-like to have a time specified to pay out the money, and if he was ever going to take it he ought to take it——

Q. Let me ask you right here if you ever used any money sent you by Mr. Wenham in the purchase of this property?

A. Not to my knowledge.

Q. Now will you please answer me this question: If you wrote such a letter as you say you think you did, and it was after the letter of June 5th, 1888, are you certain, or to the best of your recollection did you properly direct and post that letter in Butte?

A. I did, and put it in the office with my own hands; in the Interior Department post office. I generally do. I do not know when I have asked a man to deliver a letter in the post office for me; I never have done so. Did not write any letter to Mr. Wenham about this case after that letter in which I told him the money must be paid within thirty days, until I got the $1000 the next

spring; I have no knowledge of it, for I thought that he had not used me well, and I felt a little indignant, and that was the reason I did not write any more to him after that.

Q. Then when you received the $1000 in 1889, you did not accept it for what reason?

Objected to.

The Court—The letter states, I believe. It tells his reason.

Q. Now, Mr. Switzer, from the beginning of this transaction between Mr. Wenham and yourself, did he ever make any proposition to you by letter or otherwise in regard to other matters, other claims that you and he were interested in?

Objected to as immaterial; objection sustained. Ex.

Cross-examination by Mr. Smith—

Q. Mr. Switzer, you were not the owner of half interest in this claim you were trying to buy when you wrote Mr. Wenham about it, was you?

A. I bought part of it at one time and the other I bought later.

Q. That was the part you would have liked to buy for him for some friend?

A. I might have.

Q. You owned one-half of it.

A. I bought one-half of it at a time, because one man lived in Butte and the other in Colorado.

Q. Now then, it was that man's interest that lived in Colorado that you wanted to buy for Mr. Wenham or some friend of his wasn't it?

A. No, sir.

Q. Let me ask this question; let me read this: "Mr. Wenham, if you have a friend who desires one-half of a good claim lying alongside of the Alta, which I think can be got for $1500 I wish you would let me know." What do you mean by saying which you think could be got for $1500; somebody own half of that?

A. I owned half of the Burner Lode, I think, at that time.

Q. You say, "Sometime ago I bought one-half of it; it cost him $2000. He is not a miner." He had bought one-half at that time?

A. Yes, sir. This other half—the man lived in Colorado.

Q. Now then, you corresponded with that man, didn't you, after getting word from Mr. Wenham?

A. I talked——

Q. About the purchase of it. Now when you bought this property didn't you use this $500 that Mr. Wenham had sent you before that?

A. I didn't use a cent of his money; I had the drafts.

Q. Now I will ask you, Mr. Switzer, didn't you send $1,500 to give to Mr. Wenham after the suit was brought?

A. Drafts.

Q. Was not one of $500 signed by Andrew J. Davis, Jr., cashier of the First National Bank of Silver Bow county?

A. He never signed, to my knowledge.

Q. Didn't you go to that bank for $500, which draft was signed by Davis, and put it together with the $1,000 and send to your attorney?

A. I do not know.

Q. That money was put in the bank and kept there?

A. No, sir.

Q. Where?

A. I deposited it in the bank.

Q. Didn't you get the money out of the bank to pay for this claim.

A. I think I can explain. I wanted to get a draft to go to New York—direct to New York—and I told Mr. Davis to make me a draft to New York.

Q. You say, in your letter of April 28th, "Yours of the 23rd, 1888, is received, with one check of $500 on the First National Bank of Cleveland, Ohio, * * * as soon as I can hear from the party * * * * * the money is in the bank. You put this money in bank?

A. Deposited it in bank—the $500—in my favor, I think.

Q. And when you bought the claim you paid the money out of the bank, didn't you?

A. I paid—yes, I think, out of the bank. Had several thousand dollars on deposit.

Q. On June 5th did you ever write Mr. Wenham more than one letter in which you told him how much he had to pay you for this claim?

A. I do not know as I ever did; I do not remember now.

Q. Then this is the only letter, now Mr. Switzer, in which you made a proposition to Mr. Wenham as to selling him the one-half interest, and the amount he would have to pay for it. "I am sure of two veins * * * but it costs over $1,500 * * * cost me about $4,000 all told * * * Property is rising in Park Canyon. Under the circumstances I had to take a deed on my own account and came near losing it at that. Others would have taken it at higher figures." You were buying from somebody at that time?

A. I bought half interest from this Colorado man. I was buying a one-half interest at that time.

Q. "Now friend A. A. Wenham send me $1,500 and I will make a deed of the one-half of the entire Burner property." Did you ever make him any other proposition besides that—in the same letter you say—

A. No, not stating any price.

Q. "As I have received $500 of you so the balance will make the purchase price $2,000," that was $500 that he had sent you Mr. Switzer?

A. Yes, I—Mr. Wenham I think requested me to put the money in the bank and I did so.

Q. Now Mr. Switzer when you were making these payments through March, April, May and June, 1888, you were purchasing this property for Mr. Wenham?

A. I would never purchase it for Mr. Wenham until he furnished me the money to do so. I told him I thought he could get the property for $1,500.

Q. "Now friend A. A. Wenham send me $1,500 and I will make a deed of half the entire Burner property." Why do that if you were not purchasing for him?

A. I thought I would satisfy him and make him a proposition.

Q. Why say here "under the circumstances I had to take a deed in my own name."

A. Because I had no money of his that I could use.

Q. You wanted to secure this and take a deed in your own name?

A. I did not have enough of his money. I never agreed to furnish money for him to buy real estate.

Q. Was it not in order to secure this that you took a deed in your own name, when you furnished this money for him?—

A. It would secure me, but my purpose was to buy the ground, whether he took an interest or not.

Q. Did you not tell him that you would purchase one-half for him for another man?

A. I did not consider that I was told to furnish the money. Was not purchasing for Mr. Wenham; did not know that he would take a foot of ground.

Q. When he sent you $500 in this letter here, "Yours of the 13th at hand. According to your wishes I enclose you $500, payable to your order. This is a New York draft, and is as good as gold, * * in fact the banks prefer drafts to currency. Now if you will go quietly to work and not let the parties who want to sell get excited, when he agrees to sell give him the $500 to bind the bargain." What was that fact, didn't you know Mr. Wenham wanted the claim?

A. He said he wanted an interest—

Q. Were you not negotiating with this Colorado party for the purchase the buying of the interest for Mr. Wenham?

A. No sir, I was writing to him about it; I proposed to offer it to him if he would pay for it.

Q. And the purpose of taking deed was to secure you for money advanced?

A. I suppose—

Q. Between the month of June, 1888, and April 1889, was there not a rise in values over there, the.....mine?

A. Yes Sir.

Q. And was not that the cause of your refusal to make this deal in 1889?

A. No Sir.

Objected to as immaterial. Objection overruled.—Ex.

Re-direct Examination, by Judge Nelson—

Q. Mr. Switzer, in the letter of April 23rd, 1888, in which Mr. Wenham encloses $500 to you,—"If you do not want to use the money immediately you could make a special deposit in the bank till you needed it,"—what did you understand by Mr. Wenham's directing you to make a special deposit of that $500?

Objected to.

A. I put it in the bank in my own name.

Q. Did you do so?

A. No, because I was requested to pay out the money on a ————————that I would have to send to him.

Q. In this same letter he says: "Now if you go to work quietly, and not let the parties who want to sell get excited, when he agrees to sell give him the $500 to bind the bargain." Did you give him any $500 to bind the bargain?

A. No. Took the deed and paid the money for the other half the same day I took the deed. Think I bought interest in May, some time in May; bought the other interest, and in June 5th offered to sell to Mr. Wenham.

Q. In buying this claim, one-half interest, did you use this $500, or any of Mr. Wenham's money in your hands?

A. I had the money on deposit there—that $500 I put it in the bank.

Q. You kept that $500 reserved for Mr. Wenham?

A. I had $500 for Mr. Wenham; I don't think I put it out. I did not put it in the bank as special deposit because I thought if I did I could not use it at all. Thought I might want to use it for Mr. Wenham—he was talking about buying an interest in the Sunlight claim; I did not know which he meant.

Q. Now, in your letter of June 5th, you say, "As I have received $500 of you, so the balance, $1,500, will make the purchase money of your part $2,000." Now you say you have received $500: at the time of this letter, June 5th, 1888, where was this $500 of Mr. Wenham's?

A. In the draft. On June 5th, 1888, I think it was still in the draft; had not put it in the bank. According to my best recollection the $500 was in the same shape in which I received it. I remember when I obtained a New York draft from the First National Bank of Butte for the purpose of returning it to Mr. Wenham—I don't know as I can state the time. I think it was shortly after the suit was begun. Had at that time a draft in my possession for $1000; kept that draft in the same shape I received it.

Q. Did you get the $500 in the condition in which you paid it through me to Mr. Wenham?

A. I called upon Mr. Davis to give me a check on New York. I wanted to send a draft to New York.

Q. So that you are positive, are you, that you kept the $500 in the same shape in which you received it until after you purchased the other half in the Burner Lode Claim?

A. I believe I had it in a draft some time after that.

That is all.

Witness excused.

Defense rests.

Mr. Wenham called in rebuttal testified as follows:

Examination by Mr. Smith—

Q. You may state to the Court whether or not you ever received any communication at all from Mr. Switzer in which he notified you that the money must be paid within a certain time?

A. Never received any such thing.

Q. Did you have any knowledge of the fact?

A. Not the slightest.

Q. Did you ever send him any money for any other purpose than for this?

A. Never except for that particular purpose. I remember the two drafts that were returned to me by Mr. Nelson; one was a $500 draft, Butte City; signed, I think, by the First National Bank cashier of Butte City.

Q. Was it the same draft, $500 draft, which you had sent to Mr. Switzer from Cleveland, Ohio?

A. It was not. No, sir.

That is all.

Cross-examination by Mr. Nelson—

Q. You have just stated that you never received any letter from Mr. Switzer in which he stipulated that this money must be paid within a certain time: if so, please state why it was that after he made you an offer in June 5th, 1888, of an undivided one-half interest in this claim, and you subsequently, as you state, have a strong impression, or to the best of your knowledge and belief you

wrote asking for further details, and that letter was written in June, 1888, some time you think, why you never remitted to him anything on account of the $1500 until ten months after that time?

A. I will explain it to you. As Mr. Switzer was running the Monitor Tunnel at that time, and I had bought an interest with him through his agent, and at times he was sick, and we used to correspond right along. The time I wrote for survey, I expected a reply, but knowing Mr. Switzer was busy I let it run along until I began to think I was getting careless. I remitted him that $1000 and asked him if he would——

Q. Did you not know at the time you remitted him that $1000 he had specifically stated to you that $1500 was necessary?

A. That is explained in the letter; I sent him this $1000 on account and knew there was more than $1500 due at the time, patenting, etc. It was sent on account. Mr. Switzer during that time was getting money from our people in Cleveland, running this tunnel, and I had every confidence in him. I admit it was very careless to leave it so long, to let it run on so long; I got no letter and no details ever came.

Q. But in the letter which you have filed here he stated he had $500 still—leaving $500 to do what he pleased with.

A. He had that $500 a month or two or three months before he bought this claim. Paid other moneys, but not on account of that.

That is all.

Witness excused.

Exhibit 1.

BARGAIN AND SALE DEED.

This Indenture, made the.....day of.....in the year of our Lord one thousand, eight hundred and ninety, between William S. Switzer, of Silver Bow County, State of Montana, party of the first part, and A. A. Wenham, of the City of Cleveland, State of Ohio, party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of Fifteen Hundred Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns, forever, all of the following described property, situate, lying and

being in said Silver Bow county, State of Montana, and particularly bounded and described as follows, to-wit:

The undivided one-half (½) interest of, in and to the Burner quartz lode mining claim, the same being lot No. 258 in township three (3) north range seven (7) west, and being designated as survey No. 1774 and being bounded on the north by the Alta lode mining claim, and on the east by the Homestake quartz lode mining claim, and on the south by the Silver Crown quartz lode mining claim.

Hereby conveying all the right, title or interest which said party of the first part now has in or to said above described premises, and all the right, title or interest which said party of the first part may hereafter acquire to said premises by the issuance to him of a patent from the Government of the United States to said Burner Lode mining claim.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered in presence of—	
.....	.....
.....	.....
.....	.....

Endorsed: *Bargain and Sale Deed.* Wm. S. Switzer to A. A. Wenham. Dated.....188.. Filed for Record .....188.. at.....minutes past.....o'clock ....M. .....County Recorder. By.....Deputy.

Territory of Montana, } ss.
County of Silver Bow, }

I hereby certify that the within instrument was filed for record

in my office on the.....day of.....A. D. 188..,
at.....min. past.....o'clock....M., and recorded at page
.....in book.....of.....Records of Silver Bow
County, Montana Territory. Attest my hand and seal of said
county. .....County Recorder.
By ..... Deputy. Filed May
27th, 1892. Geo. W. Sproule, Clerk.

Exhibit No. 2.

This Indenture, made the.....day of.....in the year of our Lord, one thousand eight hundred and ninety between William S. Switzer of Silver Bow County, State of Montana, party of the first part and A. A. Wenham of the city of Cleveland, State of Ohio, party of the second part, witnesseth, that the said party of the first part for and in consideration of the sum of Two Thousand Dollars, lawful money of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns, the following described real estate, situated in the said County of Silver Bow and State of Montana, to-wit :

The undivided one-half interest of in and to the Burner quartz lode mining claim, the same being lot No. 258 in township three (3) north range seven (7) west, and being designated as survey No. 1774, and being bounded on the north by the Alta quartz lode mining claim, and on the east by the Homesteake quartz lode mining claim, and on the south by the Silver Crown quartz lode mining claim, together with all the tenements, hereditaments and appurtenances thereunto belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest of said party of the first part in and to said property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part, of, in or to the said premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises, with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered in presence of	
.....	.....
.....	.....

Endorsed:—*Quit-claim Deed*.....to ..... Territory of Montana, County of ..... ss. Filed for record..... A. D. 188... at.....o'clock ...m. and recorded in book .....of Deeds page.....Records of.....county, Montana. ....., County Recorder. ...., Deputy. Filed May 27th, 1892. Geo. W. Sproule, Clerk.

Exhibit No. 3.

BUTTE CITY, M. T., Oct. 2, 1887.

Mr. A. A. Wenham:

DEAR SIR—Some time has pased since I directly heard from you. Mr. Pomeroy said he would keep you posted. The tunnel has during the past time has been moving steadily onward with good improvements inside and outside. Everything is running in Butte mining district with good results; one very rich mine has been opened by a St. Louis company lately during the past two months. This mine lays north of the Alice Co. was bonded by Joseph Clark for $40,000.00 I presume from what I hear it can't be bought for $500,000.00. Before it was opened it was considered but a good prospect; it lays west of our group of claims in the main center veins of the mother veins of this Great Mining Center. Dear Sir you can't imagine the great mines owned by the Great Anaconda Syndicate, all lying on this great mining zones of very large width up to I hear as wide as 100 feet wide. The Montana Union R. R. Road Main and switches so constructed as to shoot the ores into the 30 ton cars which one man can do. I think the Anaconda Co. has ten or eleven of these large mines; some of them lays about 4000 thousand feet West of our ground all within a mile and a half of our ground, some may be little farther, but all on the center of this great belt of these large zones mines. I believe we shall get good mines when we get further north more in the center of this mineral Belt while there I will have more depth. Depth is the main thing to gain here. The formation has been harder than I expected, but

of a good character. Now I am in granite; it may be all granite now though, but the veins which the surface indicates very much. The Railroad Company tunnel is in pure original granite of the best kind both ends of the tunnel, east and west side end; east end starts in on the fraction. I am running faster than last, month, running three shifts 8 hours per shift night and day excepting Sundays. Pay about fifty cents per foot for not running Sundays. Is this any disgrace to the Company? I think not. I have made considerable improvements on the outside. The mines are all surveyed for patents fast as time will permit. I believe the grounds are all good soon as tested which takes time; if anyone thinks I am not moving for the best they are wrongly posted or wrongly informed. Every unprejudiced one believes I shall get it good as soon as depth is acquired by getting under. I think now our ground North of the Monitor will be first rate as the rich developments north of the Alice and Moulton mines are so good. The straight lines North of the Monitor from the new strike will run North of the Monitor within three hundred feet as it plainly looks by the surface grounds. Mr. Wenham, I believe you will get twenty dollars to one in value when these mines are developed. Good mines are like good improved farms when improved they never will be worth less. Good mining grounds are very scarce in Montana. When they are bought up it cost money to get them and not a little at that for they are sure real estate. The Budd property got in a controversy with partners. Budd locked it up but for the reason it needs capital to pump and a quartz mill in the water, bottom of the tunnel plenty ore. The Major Budd mine is a good mine. I think a freeze out game is going on. I know more about the scheme than Budd does. I know what this mine is worth; he has bought another large prospect and is going to work it this coming winter season which Budd and one partner owns. The parties that bonded the Budd Mine advanced some money, and now want to litigate and freeze out so I privately hear of the matter.

Mr. Wenham, if you have a friend who desires one-half of a good claim lying alongside of the Alta lode which I think can be got for $1500.00 I wish you would let me know. Some time ago I bought one-half of it; it cost him about $2000 thousand he is not a miner; the ground is a softer formation than where I am running our tunnel, and can be worked very easy its sloping towards the creek, and adjoining so the ores can be all run from it and all concentrated through our concentrator. It slopes North to our South line of the Alta while our grounds slopes south so sloping together its cheap I think. two large veins run lengthwise through it east and west, same course as ours and please let me know from now until Spring is the time to pick up property cheap. if you think a sale can be effected I will send you a copy or a plat of it as it lays adjoining our grounds the alta lode claim, then any one can come out or I will

get a deed of it in the bank and the exchange can be made either way, and I will get it cheap as any price can be had for it. Yours in confidence, William S. Switzer.

I think I shall get a vein soon I changed my crew of miners I am running stronger handed, I run a side drift for blasting purposes five or six hundred feet in a straight line tunnel is too far to operate blasting in the drift, my tramway is all finished first class work, I have built one building 36 by about 22 feet wide and builded up around the mouth of the tunnel so as to save all the room on the South side of the creek for building purposes, for a concentrator when necessary. I thought you would have come out before now, I would like to show you around the camp, and these great mines you cant believe all you hear in these papers but come and see how it is. My health is better, hope you are all well.

Verily yours

WILLIAM S. SWITZER.

The Hope mine is good ores ans.

Exhibit 4.

BUTTE CITY, Mar. 7th, '88.

Mr. A. J. Wenham & Sons, Cleveland, Ohio:

FRIEND WENHAM—Your favors of the past are thankfully rec. Having been somewhat afflicted and being gone from Butte, at times not having much to materally interest you, its possible you are better posted, than I could through the public press; we have had a fine winter season, yesterday received a snowfall of about 12 inches making good sleding, but moderate winter weather, times are reasonably good mining brisk, fair for this season of the year, the Anaconda is building larger also the Colusa. I have not done anything in relation to the Sunlight west, one of the owners as yet is away, but will be in this month. In relation to the claim I wrote you, the Colorado party owner was out, I think he will sell or will incorporate during this year. I am running steady night and day in the tunnel. Am in 700 feet I have crossed a large vein of 12 feet wide. A good mine, some ores copper, silver and good iron, this vein is on the north side of the New Emerald, its course north of east dips about ten degrees south, its a good one, a true fisure if it gains widening as it now shows under the hanging wall it will be fifty feet wide when it is fifty feet deeper than the tunnel, this makes our surface cropping report all true, more veins than reported on the surface: the railroad tunnel will be finished in about a month. I think the trains will run about the 1 of July, '88. I have large croppings of veins ahead of the tunnel, the papers are still trying to

blackmail us but we don't ask any favors of them, their reports are too thin I see by your Journal that many necessary improvements are being made or advised by the wise heads, they are like cutting a coat not knowing the size. I think you will do well to secure the interest I spoke of joining the Alta Claim, a fine group of six veins runs the whole length of the Alta, the veins are very large, but it needs more depth, but the location for developing is fine, let me hear from you as practicable.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27th. 1892. Geo. W. Sproule, Clerk.

Exibit 5.

A. J. Wenham's Sons,
Wholesale Grocers,
138 Water, Cor. Frankfort St.

Cleveland, O., March 15, 1888.

Mr. Wm. S. Switzer, Butte City, Montana:

My Dear Sir:—Yours of the 7th at hand, and allow me to congratulate you on having cut so large a vein on the Emerald, and what is still better, a true fissure containing some iron, that I understand works easier at the mills when it contains iron. We must all acknowledge your good judgment in the manner of working and in selecting your ground. I hope the papers of Butte will get tired of trying to blackmail the Monitor soon. I heard a very fine compliment paid to your good judgment by Mr. W. A. Clark, the banker of your city: he said you used good sound judgment and had a good property. I did not think that sounded much like blackmail. So you see you have friends at home as well as abroad. I mail you the San Francisco Miner, with a piece marked in blue pencil, which may be of interest to you.

Now about the claim adjoining the Alta. I want to go in with you. Could the interest be bo't for $1.000. Friend Whitney will be out to see you soon, I think. We could work the claim after the Monitor was well under way: I suppose you would be in no hurry to develop that claim till after the tunnel was complete. I hope you will be successful in getting the Sunlight west, if you think it is all right, as I suppose that could be worked very easily from the tunnel.

I see you are going faster in the tunnel, the formation must be softer to work. Hope to hear good news from the Sunlight East before long. With my best wishes for your early discovery, I remain,

Very truly yours,

A. A. WENHAM.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 6.

A. J. WENHAM'S SONS,

Wholesale Grocers,

138 Water, Cor. Frankfort St.

CLEVELAND, O., Mch. 26, 1888.

Mr. Wm. S. Switzer, Butte City, Montana:

MY DEAR SIR—Yours of the 20th received to-day, I am glad to know you have such confidence in Mr. W. A. Clark, he must be a straight forward man in business.

How is the tunnel getting along, how long before we get news from the Sunlight lode. From the ideas I get you are about 100 feet or so from it yet. That claim ought to show up very fine since you have had such flattering prospects in the new Emerald. When you get into the Sunlight I shall try and come out and call on you and look around for a few days, if you get there before the weather gets too hot. Hope you will be able to secure the Sunlight West before it gets too late if you should get the claim adjoining the Alta all right, there is no hurry, as we could not work it for some time to come. I suppose we could sink a shaft on it to pay ore for about $2000.00 & if we got the ore it would pay us well if the ore was rich enough, as transportation is so close at hand it would not cost us much to get the ore to the Mills. Hope you will soon get through with having blizzards out in Butte. We had one here about the first of the month which stopped all communication with N. Y. City either by rail or telegraph for about a week, the worst known in 50 years.

Hope to hear from Sunlight East before long. You must not

get out of patience with me if I am over anxious, hoping to hear from you favorably before long, I remain,

Very truly yours,

A. A. WENHAM.

Filed May 27, 1892, Geo. W. Sproule, Clerk.

Exhibit 7.

BUTTE CITY, Apr. 13th, '88.

Mr. A. A. Wenham, Cleveland Ohio:

DEAR SIR—Yours of the 26th and papers rec'd. I am thankful to receive your letter and papers which are very interesting to me, but we can't believe all we hear in public print, but all make mistakes.

I am driving ahead our tunnel running on three eight hour shifts with some more good results. I have drove through another 6 feet vein, containing copper 20 per cent and some silver, a good vein. I am in now 750 feet north of the tunnel door, formation very good with some water, am nearing on more water soon, and in relation to the west Sunlight it can't be had for less than 25000 dollars and five thousand dollars down, this is their decision after two months thinking, they offered to take 5000 thousand over a year ago, but they see what their property may be worth in the near future.

And in relation to the interest nearest the Alta it can't be had for less than about $1500 dollars if it can be bought at any price, but I shall know in about twenty days and I will write you soon as I can get to know what I can let you have it for he may get excited and ask more; mining property is changing hands here now and a little anxiety shown now, but nothing surprising yet: what we expect is another road during this present ten months to come maybe: near Park Canyon somewhere we have a steam motor running from Butte to Meaderville every 15 minutes, and a horse street car from depot to Butte City. Mining is very brisk in Butte Country. My health is reasonably good. Hope you are well.

Verily yours,

WILLIAM S. SWITZER.

One thing more, if you conclude to take the interest you better send $1500 dollars to the First National Bank of Butte as if you wait it may slip in others hands I am good for all you send to me.

Exhibit 8.

A. J. WENHAMS SONS,
Wholesale Grocers,
138 Water, Cor. Frankfort St.

CLEVELAND, O., Apr. 5, 1883. (8)

Mr. Wm. S. Switzer:

DEAR SIR:—I mail you to-day the Scientific Miner, in which I note that the West Granite people have struck it very rich, equally as good as the Granite Mountain people.

Mr. Pomeroy was here this week, and feels very well satisfied that he has about completed his contract with the reissuing of the 25,000, and expects to see you the last of April or first of May. I sincerely hope you will be able to secure the Sunlight West, as we want it if it is a possible thing, if you think it is all right. *How about the claim adjoining the Alta claim? Can you secure the ½ you spoke of? Let me hear from you soon as practicable.* How is the Monitor? Do you expect another vein soon?

Very truly yours,

A. A. WENHAM.

Filed May 27th, 1892. Geo. W. Sproule, Clerk.

Exhibit 9.

A. J. WENHAM'S SONS,
Wholesale Grocers.

CLEVELAND, O., Apr. 23, 1888.

Mr. Wm. S. Switzer, Butte City, Mont.:

DEAR SIR:—Yours of the 13th at hand and contents noted. According to your wishes I enclose you $500 payable to your order. This is a New York draft, and is as good as gold at the First National Bank in your city; in fact the banks prefer drafts to currency. Now if you go quietly to work and not let the party who wants to sell get excited, when he agrees to sell give him the $500, to bind the bargain, and you can telegraph me for the other $1,000, which I will send immediately on receipt of notice, and if you can't buy all of his interest buy half of it.

Do you think it possible to get the Sunlight on a bond for 18 months, and would it be possible to get underneath the Sunlight West inside of that time to take out ore enough to pay the bond at the expiration of that time. We could easily get them the $5,000 down if we could get at the ore in the time named in the bond.

Please give us your opinion about the above, as your judgment we can fully rely upon. In regard to the claim next the Alta please keep it confidential until something is done; and by the way, what is the name of the claim?

Please answer soon as possible, that I may know you have received the money.

Very truly yours,

A. A. WENHAM.

P. S.—If you did not want to use the money immediately you could make a special deposit in the bank till you needed it.

A. A. W.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 10.

BUTTE CITY, M. T., Apr. 28th, '88.

Mr. A. A. Wenham, Cleveland, Ohio:

MY DEAR SIR—Yours of the 23rd '88 is received with one check of $500 dollars on the First National Bank of Cleveland, Ohio, the mining lode claim is known as the Ontario or Burner lode mining claim: soon as I can hear from the party the matter will be concluded: the money is in Bank. In relation to the Sunlight West it will take some time before I can get any further move in the matter, when the parties get over their excitement then they will feel better; the tunnel matters are moving as usual; business is increasing. I hope you will prosper in your Arizona enterprise, it needs perseverance. Verily yours,

WILLIAM S. SWITZER.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 11.

A. J. WENHAM'S SONS,
Wholesale Grocers.

CLEVELAND, O., May 26, 1888.

Mr. Wm. S. Switzer, Butte City:

MY DEAR SIR—Yours of April 28th at hand acknowledging receipt of check for $500.00.

How are you progressing in the tunnel. Hope to hear of another cut before long. Can ore commence to be taken out of the 6 ft. vein soon as the Rail Road is completed across the new Emerald claim down to the city?

I hope to hear of you making some valuable strikes from now on in your tunnel as there certainly must be valuable ore under the Sunlight and Monitor claims from surface prospects. I suppose Mr. Pomeroy will be with you shortly and make you a visit as I have not heard any news for about a month.

Kindly give me what news there is if any about the tunnel and much oblige, Very truly yours,

A. A. WENHAM.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 12.

BUTTE CITY, M. T., June 5th, 1888.

Mr. A. A. Wenham, Cleveland, Ohio:

MY DEAR SIR—Your note with paper is received, glad to hear from you, the tunnel is moving on as usual I am in good sound granite have not crossed more veins yet: cut a side drift for blasting purposes, but am going ahead now, must get a vein soon, but sometimes the distance vary 10-20-15 or 30 feet before reaching the veins, if they don't move I shall drive through them when I get to them.

In relation to the Burner mining property I have got it all and paid for it, and surveyed it for patent but am doing one hundred dollars worth of work so as to have over $600 dollars worth of work which will be a necessary improvement I am sure of two veins on the ground But it cost more than $1500 it all cost me about $4000 all told, but I was determined to have it if it cost more. It will pay to hold when patented. Property is rising in Park Canyon.

Under the circumstances I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near losing it at that; others would taking it at higher figures. Now friend A. A. Wenham send me $1500 dollars and I will make you a deed of one undivided one half of the entire Burner property free of all work excepting the one hundred which I am now doing, which work will be over $600 dollars sufficient to get the patent, then you will have to stand one half the expenses of the patent which only is the regular prices in this district and territory.

As I have received $500 of you so the balance $1500 will make the purchase money of your part $2000 I will you more in detail next letter.

Everything in Butte is moving——

But I am sorry to note the great cave in the St. Lawrence mine Sunday about 12 o'clock noon the great timbering gave way, and they fell about 400 feet deep, and about 200 feet in length and caved in but Providentially as it was at changing, but one man is supposed lost one half hour sooner about 100 men would been lost.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 13.

A. J. WENHAM'S SONS,

Wholesale Grocers.

CLEVELAND, O., April 6, 1889.

Mr. Wm. S. Switzer, Butte City, Montana:

MY DEAR SIR:—Not having heard from you since some time last April or May, I have felt as though you had rather neglected my last letter written to you some time in the early part of June last. However, as you are the senior, I accept the situation. I enclose check on N. Y. for one thousand dollars. Please let me know how much you figured to be the balance. You now have fifteen hundred dollars in total from me ($1,500.00.) I have thought it quite strange that I had not heard from you; however, I supposed you would write when you were ready. But as it was a matter of business, I thought it my duty to write to you now, as time was drawing close. I hope you are enjoying good health, and that your

tunnel is progressing as well as could be expected. I hope some day you may reap a rich harvest out of your enterprise. Still such enterprises and their results are only temporary. We can not take the results of our material labors with us, but our spiritual labor development we carry with us into an indefinite eternity.

Again wishing you the compliments and successes of the season, I remain yours very respectfully,

A. A. WENHAM.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 14.

BUTTE CITY, M. T., May 30, 1889.

Mr. A. A. Wenham:

Your note of April 6th '89 containing one check of one thousand which I deposited in the First National Bank for safe keeping until you call for it, also your five hundred check is in Bank subject to your order: now the best investment I can make with the money for you is in the Monitor property which I think will be safe. By your request and Mr. C. W. Pomeroy's request I will make you a deed for 1500 shares of the Monitor, shares at one dollar per share. *I can't make you any deed to or in the Burner ground* nor can the West Sunlight be bought at any reasonable price, but its possible it can be bought within a year or two, I think the Monitor property is good, at the low price of $100.

In relation to business in this country, copper and silver mining, everything is moving good, copper mining is and will be ahead in legitimate mining with more per cent in minerals or metal and more per cent money easier got than any mining business in the world: its consumption will increase hereafter all over the world, the developments in the Monitor tunnel has been and still is steady on night and day and will be finished long before Mr. Pomeroy thinks, providing he puts up the money very soon, which he tells me he will, but he is away behind his calculation, I presume he is doing best he can and between the veins I still have a good granite formation. But the veins are softer formation. I am spending more than I get on this Monitor tunnel deal getting nothing for my improvements, but its all right.

I think if Mr. Pomeroy sends me the money very soon that he said he would, I shall be able to finish the Monitor in about four months, unless the Monitor vein pitches north strong which in such

case will take me about one hundred feet further, as I am now in about one hundred feet from the tunnel door, no man can inspect this tunnel or go in this tunnel until finished.

Some new strikes are reported, now I have developed the outlines of things in relation to the Monitor tunnel soon as Mr. Pomeroy is heard from: I can give a still more encouraging report, but so far everything is good as can be expected, some men want things better than God made them but I am willing to take things as they are.

Verily yours,

WILLIAM S. SWITZER.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

Exhibit 15.

CLEVELAND, OHIO, June 4, 1888.

Friend Switzer:

Mr. C. C. Frost is in trouble and wants $500 to carry on his suit; he is willing to give deed of his interest in Sunlight as security for the $500 for 3 or 4 months the deed to be put on record; now friend Switzer if you think Mr. Frost can give a good deed as security and you think best and safe to loan him the money you can give him the *$500 I have in your care* and I will send you more to take its place. I would get his note also his deed: is it necessary for his wife to sign the deed in Montana? have same put on *record*. Would it not be best for you to have your lawyer fix up the loan?

It would be much better to have Mr. Frost's *interest* in the hands of some one who has the interest of the tunnel at heart than to have an outsider get hold of it and make us trouble.

The money *I have with you might* as well be drawing interest. What is legal rate of interest in Montana? If anything should happen that Mr. Frost could not meet his obligations, his claims would not fall into strangers hands. Please let me know lawyers fees and I will remit on receipt of same, have the deed and note made in the name of Arthur A. Wenham, how is the tunnel progressing does the 13 ft. vein belong to the Company or to the Emerald Co. I think Mr. Pomeroy will see you very soon, hope you are getting along as well as you expect, let me hear from you as soon as you see Mr. Frost and oblige.

Yours very truly,

A. A. Wenham.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

CLEVELAND, OHIO, May 20, 1889.

Mr. W. S. Switzer, Butte City.

MY DEAR SIR—On Apl. 6th I sent you by registered letter $1,000.00 to apply on my half of the Burner Lode Claim, together with the $500 I advanced you some time ago, please let me know if you received the draft all right and the amount due you still, and I will remit you so you can mail me deed of same, please let me hear soon as possible so I may know that the draft arrived safely. I suppose you are very busy pushing the Monitor. I have not heard from it in so long I hardly know how you are progressing. I will try and visit you this summer early if possible, please let me hear from the tunnel and how it looks, hope you are enjoying good health.

What do you think of the copper market? Will it be apt to go much lower in price? I suppose it will be some time yet before the Monitor tunnel gets into the Monitor claim proper. Kindly give me the news from your mines and much oblige. I suppose your railroad accommodations are very good now since the new road is good in operation. Wishing you speedy success, I remain,

Yours very truly,

A. A. WENHAM.

Endorsed: P. Ex. 16. Filed May 27th, 1892. Geo. W. Sproule, Clerk.

Deft. Exhibit 1.

HELENA, MONTANA, May 23. 1891.

A. A. Wenham, Esq., Cleveland, Ohio.

DEAR SIR—The case of A. A. Wenham vs. William S. Switzer having been dismissed in the U. S. Circuit Court for the District of Montana I herewith enclose to you Draft No. 139281 drawn by First National Bank of Cleveland, Ohio, upon Central National Bank, New York City, to your order and by you endorsed in blank, being the identical draft sent by you to William S. Switzer of Butte, Montana, in your letter to him dated Cleveland, Ohio, April 6th, 1889: and also Draft No. 114599 dated May 23d, 1891, drawn by the First National Bank of Butte on Clarke, Dodge & Co., New York City, in your favor for $500.00 being return of that amount as

enclosed by you in letter from you to William S. Switzer of Butte, dated April 23d, 1888.

Please acknowledge receipt of enclosed drafts and oblige.

Yours truly,

A. H. Nelson, Counsel for Wm. S. Switzer.

Filed May 27, 1892. Geo. W. Sproule, Clerk.

DRAFT.

The First National Bank of Cleveland.

$1,000.00 Cleveland, Ohio, April 8th, 1889.

Pay to the order of *A. A. Wenham* One thousand Dollars.

The Central National Bank, New York City. Chas. H. Wilson, Cashier.

No. 139281.

Endorsed: Pay W. S. Switzer, A. A. Wenham. William S. Switzer pay to the order of yourselves, Clarke, Dodge & Co., Apr. 16, 1892, for account of First National Bank, Butte City, Montana, Andrew J. Davis, Cashier. Clarke, Dodge & Co. For deposit only to credit of Clarke, Dodge & Co.

In the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

A. A. Wenham, *Plaintiff*, *vs.* W. S. Switzer, *Defendant*. } Motion to make notes of Stenographer notes and minutes of the Court.

Comes now the plaintiff, A. A. Wenham, by his solicitors, and moves the Court to adopt and make as the notes and minutes of the Court on the trial of the above cause the evidence taken and reduced to writing by the Court Stenographer, Florence V. Selby, as the deeds offered in evidence by the plaintiff and filed with the Clerk of this Court, as plaintiff's exhibits 1 and 2. The evidence taken by said stenographer and reduced to longhand is hereto attached and made a part of this motion.

This June 26th, 1892.

Samuel Word,
Robert B. Smith,
and R. L. Word,
Solicitors and Attorneys for Plaintiff, A. A. Wenham.

State of Montana,
County of Lewis and Clarke. } ss.

Robert B. Smith, being duly sworn, on oath says he is one of the solicitors for plaintiff in foregoing stated action, and that on July 26, 1892, he left a copy of above motion at office of A. H. Nelson, defendant's solicitor, said Nelson and defendant both being absent from the said county and city.

ROBERT B. SMITH.

Subscribed and sworn to before me this July 27th, 1892.

JNO. S. M. NEILL,
Notary Public.

Filed July 27, 1892.

GEO. W. SPROULE, Clerk.

And thereafter, on the 27th day of June, 1892, the following further proceedings were had, and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

This cause heretofore submitted to the Court for consideration and decision, came on this day for the judgment of the Court, and after due consideration it is ordered and decreed that said complainant's bill herein be and the same hereby is dismissed at complainant's cost.

And on said 27th day of June, the Court filed its opinion in said entitled cause, which said opinion as filed is in the words and figures following, to-wit:

In the United States Circuit Court, Ninth Circuit, District of Montana.

A. A. Wenham, *Complainant*, }
vs.
William S. Switzer, *Defendant*. }

In Equity.

WORD, SMITH & WORD,
Solicitors for Complainat.

A. H. NELSON,
Solicitor for Defendant.

Opinion Filed June 27, 1892.

KNOWLES, J.

Plaintiff in his bill of complaint charges that he and defendant entered into a contract by the terms and conditions of which it was agreed that plaintiff and defendant were to purchase the Burner lode claim, situate in Summit Valley Mining District, Silver Bow County, Montana; that the defendant had the sole management of the negotiations for the purchase of said property; that it was agreed that the same should be purchased for their joint benefit and each was to have an undivided half interest in the property; that defendant represented that said property would cost about three thousand dollars, and that the one-half interest which plaintiff would receive would cost about fifteen hundred dollars; the exact sum said property would cost not then being known; that plaintiff first advanced to defendant on account of said purchase the sum of five hundred dollars, which was so received by defendant, and subsequently the sum of one thousand dollars; that instead of purchasing said property for the joint benefit of plaintiff, the defendant purchased said property in his own name; that he represented to plaintiff that he paid therefor the sum of four thousand dollars, that plaintiff tendered to said defendant the balance of said purchase price, namely, five hundred dollars with interest up to the date of tender, and at the same time presented a deed to be signed by him to the one-half of said Burner lode, and demanded of him to deed the same to plaintiff, which he refused to do.

The defendant denies in his answer the alleged contract to purchase said lode for the joint benefit of himself and defendant; he admits that he received the five hundred dollars and the one thousand dollars from plaintiff, but denies that he received the same on account of the purchase of the Burner lode, or used either of said sums in that purchase. The negotiations for the purchase of an interest in the said Burner lode were carried on by letter. All of these letters except three are before me, and the contents of the missing letters were testified to on the trial before the court. Plaintiff, it appears, is a citizen of Cleveland, Ohio, and the defendant of Butte City, Montana.

Upon an examination of these letters I find the facts to be that on October 2d, 1887, defendant owned a one-half interest in the said Burner lode. On that date he wrote to plaintiff that he thought the other one-half could be bought for fifteen hundred dollars, and if plaintiff had a friend who desired this one-half of it to let him know; that the claim was a good one, and that he had bought and paid about two thousand dollars for the other half.

It appears from the evidence of plaintiff that he wrote to defendant in answer to his letter of October 2d, 1887, making some inquiry about the claim defendant had mentioned. On March 7th, 1888, defendant wrote to plaintiff: "I think you will do well to secure the interest I spoke of, adjoining the Alta claim."

From the evidence it sufficiently appears that this referred to the property in dispute. On March 15th, 1888, plaintiff wrote to defendant: "Now, about the claim adjoining the Alta, I want to go in with you. Could the interest be bought for $1,000?" On April 5th, 1888, plaintiff wrote to defendant: "How about the claim adjoining the Alta claim: can you secure the one-half you spoke of? Let me hear from you soon as practicable."

On the 13th of April, 1888, defendant wrote plaintiff: "In relation to the interest nearest the Alta, it can't be had for less than about $1500 if it can be bought at any price, but I will know in about twenty days, and I will write you as soon as I can get to know what I can let you have it for. He may get excited and ask more." In the same letter he says: "One thing more. If you conclude to take the interest, you had better send $1500 to the First National Bank of Butte, as if you wait it may slip into other hands. I am good for all you send me."

On April 23d, 1888, plaintiff wrote to defendant: "Yours of the 13th at hand, and contents noted. According to your wishes, I enclose you $500, payable to your order. This is a New York draft, and is as good as gold at the First National Bank in your city; in fact, the bankers prefer drafts to currency. Now, if you go quietly to work, and not let the party who wants to sell get excited, when he agrees to sell give him the $500 to bind the bargain, and you can telegraph me for the other $1,000, which I will send immediately upon receipt of notice, and if you can't buy all of his interest, buy half of it."

In answer to this the defendant wrote plaintiff: "My Dear Sir: Yours of the 23d, 1888, is received with one check of $500 on the First National Bank of Cleveland, Ohio. The mining claim lode claim is known as the Ontario or Burner lode mining claim. Soon as I can hear from the party the matter will be concluded. The money is in the bank."

On June 4th, following, plaintiff wrote defendant a letter about loaning the money to one C. C. Frost, and he would replace it, but the money was not so disposed of.

On June 5th, 1888, defendant wrote plaintiff: "In relation to the Burner mining property, I have got it all and paid for it, and surveyed it for a patent. But am doing one hundred dollars worth of work so as to have over $600.00 worth of work, which will be necessary improvement. I am sure of two veins in the ground, but it cost more than $1,500.00. It all cost me about $4,000.00, all told, but I was determined to have it, if it cost more. It will pay to hold when patented. Property is rising in Park Cayon. Under the circumstances I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near loosing it

at that, others would have taken it at higher figures. Now friend A. A. Wenham, send me $1,500.00 and I will make you a deed of one undivided half of the entire Burner property free of all work excepting the one hundred, which I am now doing, which will be over $600.00, sufficient to get the patent. Then you will have to stand one-half of the expenses of the patent, which only is the regular prices in this district and territory. As I have received $500.00 of you, so the balance $1,500.00 will make the purchase money of your part $2,000.00. I will (write) you more in detail next letter."

Plaintiff in his evidence testifies, that he wrote a letter in answer to this, accepting defendant's offer, and asking for a more specific description of the property. Defendant denies that he ever received this letter.

Defendant in his evidence says, that soon after he wrote to plaintiff on June 5th, 1888, he wrote him another letter telling him he must pay the money to within a certain time. Plaintiff denies that he ever received this letter.

On April 6th, 1889, plaintiff wrote defendant asking for a plat, specifications and drawings, and enclosed him a New York draft for $1,000.00. Asking him for amount of balance due him.

On May 30th, 1889, defendant wrote plaintiff: "Mr. A. A. Wenham, your note of April 6th, 1889, containing one check of one thousand (dollars) I deposited in the First National Bank for safe keeping until you call for it. Also your five hundred (dollar) check is in Bank subject to your order." Then there is an offer to invest this money in Monitor stock. Then this follows: "I can't make you any deed to or in the Burner ground."

It will be seen from a reading of the extracts that the transaction between plaintiff and defendant as set forth in the bill, is not correct. These extracts were taken from letters which treat principally of other matters, mostly about the tunnel on the Monitor lode. The understanding was that defendant should act as the agent for plaintiff in purchasing the one-half of the Burner lode. This was a voluntary undertaking, and it does not appear that plaintiff was to pay any or defendant to ask anything for this service. It was not an agreement by which plaintiff and defendant were jointly to purchase the Burner lode, or that in any sense the agreement was for a joint transaction. There is enough to show, perhaps, that plaintiff did authorize defendant to purchase a one-half interest in that lode for fifteen hundred dollars. But not for any more. When defendant informed plaintiff that he had better send him the fifteen hundred dollars with which to purchase the claim, plaintiff sends him five hundred dollars in a draft on a bank in which he seems to be connected, and informs him that he will

send the remaining one thousand when the purchase is made. In this there is no authority to purchase this interest in the Burner lode for any amount to exceed fifteen hundred dollars. Defendant could not bind plaintiff by any purchase of that lode which involved an expenditure of any sum to exceed that amount. An agent must pursue his authority strictly, and if he exceeds it he makes himself personally liable. As far as plaintiff is concerned, he was not bound by any purchase of that property for two thousand dollars. When defendant informed plaintiff that he had paid about two thousand dollars for the one-half of the Burner lode, and had taken the deed in his own name, and that he would deed to him the same on the payment to him, the defendant, of the two thousand dollars he had expended, plaintiff testified that he wrote to defendant telling him he would take the property, but asking also for plats, and specific descriptions thereof. Undoubtedly plaintiff had the right to ratify this act of his agent, but was the simple notification that he would take the property a sufficient ratification of that act? I think not.

He says he waited ten months, expecting these specifications and plats. What for? To see whether he would accept the proposition of defendant? It looks very much as if that might have been the motive. He says he accepted the proposition without receiving them. Why he should have waited ten months before sending any money on this accepted proposition is not very well explained. At the end of ten months plaintiff does not send to defendant the fifteen hundred dollars, which would be the balance of the purchase price of the property, but only one thousand dollars, and asks defendant to figure up the balance. Plaintiff testifies that he expected the representation work and expenses for obtaining a patent to be included in this balance. This was not the proposition of defendant. The proposition was that plaintiff was to pay two thousand dollars, and was to have a deed for one-half of the Burner lode. This was plain enough. There was no figuring to be done on the balance. It was plainly stated in his letter to him what amount plaintiff was to pay before receiving a deed. As defendant had undertaken to act as an agent for plaintiff, he was required to be loyal to his trust, and not act for himself. But I do not think he was required to wait indefinitely, to see whether plaintiff would ratify his action in paying two thousand dollars for the property. Plaintiff should have ratified the action of defendant within a reasonable time. Defendant says he wrote to plaintiff he must do this within thirty days. Plaintiff testified that he received no such letter, and the evidence of defendant on this point is not as clear as it might be. But whether he wrote such a letter or not, it appears to me the delay of about ten months in ratifying the action of defendant by plaintiff, as he should have done by paying to defendant the money he had expended, was unreasonable, and that defendant had the right to maintain that plaintiff had left him to shoulder the responsibility he had assumed,

and to treat the purchase as his own. There is no pretense but that defendant paid the full amount of two thousand dollars for the property.

Although it might be held that the position claimed on the trial of the cause is only an immaterial variation from the case presented in the bill, still I do not think plaintiff entitled to recover, even upon this assumed position.

The order of the Court is that the bill be dismissed, and defendant have judgment for his costs.

And thereafter, on the 27th day of June, 1892, the complainant herein filed his memorandum of exceptions, which said memorandum of exceptions, as filed and noted, is in the words and figures following, to-wit:

Circuit Court of the United States, Ninth Circuit, District of Montana.

A. A. WENHAM, *Plaintiff*,
vs.
W. S. SWITZER, *Defendant*.
} MEMORANDUM OF EXCEPTIONS.

The plaintiff in the above cause excepts to the findings and decision of the Judge in his opinion, filed this June 27th, 1892, upon each of the following points:

Second. In deciding that the defendant's offer to purchase one-half (½) the Burner lode claim for plaintiff was a mere voluntary offer, and not binding upon the defendant.

Third. In deciding that defendant was not bound, as the agent of plaintiff, to convey the one-half of Burner Lode mining claim to the plaintiff.

Fourth. In deciding that the defendant did not act for the plaintiff in the purchase of one-half of the Burner Lode mining claim.

Fifth. In deciding that the plaintiff was not bound to take the one-half of the Burner Lode claim from the defendant after his purchase, and at the price of two thousand dollars.

Sixth. In deciding that plaintiff waited too long before tendering to defendant balance of purchase price.

Seventh. That the decision is against the weight of the evidence in said cause.

Eighth. That the decision is against and contrary to the law in said cause.

This June 27th, 1892.

SAMUEL WORD,
ROBERT B. SMITH,
AND R. L. WORD,
Solicitors for Plaintiff.

Exceptions noted.

HIRAM KNOWLES, Judge.

Endorsed: Title of Court and cause. Filed June 27th, 1892.

GEORGE W. SPROULE, Clerk.

And thereafter, to-wit, on the 30th day of June, 1892, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

On motion of Counsel for Complainant, Complainant granted thirty days from this date to prepare and file motion for new trial herein, and prepare and file Bill of Exceptions.

And thereafter on the 1st day of July, 1892, a final decree was filed and entered of record in this cause, which said final decree is in the words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit,
District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*. } DECREE.

This cause came on to be heard at this term, and was argued by Counsel; and thereupon, upon consideration thereof, it was *ordered, adjudged and decreed* as follows:

It is by the Court *ordered, adjudged and decreed* that said complainant's bill herein be, and the same is hereby dismissed and that the defendant have and recover of and from the complainant his costs and disbursements herein, taxed at the sum of $16.95.

HIRAM KNOWLES,
United States District Judge for the District of Montana sitting as Judge of the U. S. Circuit Court for the District of Montana.

Decree filed and entered this 1st day of July, A. D. 1892.

GEO. W. SPROULE, Clerk.

And thereafter, to-wit., on the 27th day of July, 1892, complainant filed his bill of exceptions herein, which said bill of exceptions, as allowed and signed, is in the words and figures following, to-wit :

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

A. A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*. } Bill of Exceptions.

Be It Remembered, That the above entitled cause having been regularly called for trial on May 26th, 1892, before the Hon. Hiram Knowles, District Judge, presiding and holding the above entitled Court, and the parties being present in person, and by their respective counsel and attorneys, and the evidence included in the minutes of the Court, and taken by the Stenographer of the Court in said cause, and which is filed in the office of the Clerk of said Court, and which is referred to herein, and made a part of this bill of exceptions, and said evidence being all the evidence in said cause, and the Court having heard the arguments of the attorneys, and the cause having been submitted to the Court for determination; and,

Be It Remembered, That thereafter, on June 27th, 1892, the Court rendered a decision in said cause, which decision is here referred as a part hereof; and

Be It Remembered, further, That upon the rendition of said judgment, and upon the same day the plaintiff, by his attorney, filed with the Judge of the Court, and had allowed and preserved, the following exceptions to the decision of the Court, and the findings of fact and conclusions of law arrived at in said decision, and to errors excepted to at the time, to-wit :

First. The plaintiff excepts to that portion of the opinion wherein the Court finds that the defendant's offer to purchase one-half of Burner Lode for the plaintiff was a mere voluntary offer.

Second. In deciding that defendant was not bound as the agent of the plaintiff to convey the one-half of the Burner Lode mining claim to the plaintiff.

Third. In deciding that the defendant did not act for the plaintiff in the purchase of one-half of the Burner Lode mining claim.

Fourth. In deciding that the plaintiff was not bound to take the one-half of the Burner Lode claim from the defendant, after his purchase, and at the price of two thousand dollars.

Fifth. In deciding that the plaintiff waited too long before tendering to defendant the balance of the purchase price.

Sixth. That the decision is against the weight of the evidence in said cause.

Seventh. That the decision is against and contrary to the law in said cause.

All of which exceptions were filed with the Clerk of the Court on the 27th day of June, 1892, and signed and allowed by the Judge presiding, all of which plaintiff, by his counsel, prays may be certified and allowed in due form, which is accordingly done.

HIRAM KNOWLES,
Judge Presiding.

State of Montana, }
County of Lewis and Clarke. } ss.

Robert B. Smith, being duly sworn, on oath says that on July 26th, 1892, he left a copy of the foregoing bill of exceptions at the law office of A. H. Nelson, attorney for Defendant, said Nelson and said defendant both being absent from the county.

ROBERT B. SMITH.

Subscribed and sworn to before me this July 27th, 1892.

JNO. S. M. NEILL,
Notary Public.

Endorsements: No. 60; A. A. Wenham, Plaintiff, vs. Wm. S. Switzer, Defendant: Bill of Exceptions. Filed July 27th, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 22d day of September, 1892, the following further proceedings were had and entered of record in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

Bill of Exceptions signed and allowed.

On motion of Counsel for Complainant, it is ordered that the notes of testimony as reduced to writing by the stenographer who

took the same be adopted as the notes and minutes of the Court in said cause.

Ordered that the motion of Complainant for a new trial herein, be, and the same hereby is, overruled.

And thereafter, to-wit: on the 17th day of December, 1892, the following further proceedings were had and entered of record herein; in the words and figures following, to-wit:

(Title of Court.)

A. A. Wenham *vs.* Wm. S. Switzer.

Petition for Appeal and Assignment of Errors filed, and thereupon appeal allowed in open Court; bond approved and citation issued.

Which said Petition for Appeal allowed thereof, assignment of errors and bond, are in the words and figures following:

In the United States Circuit Court, Ninth Circuit, for the District of Montana.

Arthur A. Wenham, *Plaintiff*,
vs.
W. S. Switzer, *Defendant*. } *Petition for Appeal.*

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Arther A. Wenham, the plaintiff in the above entitled action, by his attorneys and solicitors Messrs. Word, Smith and Word of Helena, Montana, files this, his petition on appeal, and complains that in the record and proceedings, and in the rendition of judgment and decree in the above entitled cause in the United States Circuit Court for the Ninth Circuit District of Montana, at the April term thereof, A. D. 1892, against your petitioner, Arthur A. Wenham, on the 27th day of June, and the first day of July, A. D. 1892, and from the order of the Court overruling plaintiff's motion for new trial made on the 22d day of September, A. D. 1892, manifest error has been committed, and hath intervened in said action to the great danger and injury of the said plaintiff Arthur A. Wenham.

Wherefore the said plaintiff, Arthur A. Wenham, prays that his appeal be allowed, and for such other process as may cause the

same to be corrected by the said United States Circuit Court of Appeals for the Ninth Circuit.

SAMUEL WORD,
ROBT. B. SMITH &
R. L. WORD,

Of Helena, Montana, Attorneys and Solicitors for Plff. A. A. Wenham.

Appeal Allowed.

HIRAM KNOWLES,
U. S. District Judge presiding.

Endorsements: No. 60. In United States Circuit Court, Ninth Circuit, District of Montana. A. A. Wenham, Plaintiff *vs.* W. S. Switzer, Defendant. Petition for Appeal: Filed Dec. 17, 1892. Geo. W. Sproule, Clerk. Word, Smith & Word, Attorneys for Plaintiff.

In the United States Circuit Court, Ninth Circuit, District of Montana.

Arthur A. Wenham, *Plaintiff*,
vs.
William S. Switzer, *Defendant*.
} Assignment of Errors.

Now comes the plaintiff, Arthur A. Wenham, the Appellant in the above cause and says that in the records and proceedings in the above entitled cause in the said United States Circuit Court for the Ninth Circuit, District of Montana, there is manifest error to the plaintiff and appellant's injury and prejudice, as follows, to-wit:

I.

The Court erred in allowing the attorney for the defendant to ask the defendant leading questions as to whether or not the defendant wrote to the plaintiff, stating that the full amount due to the defendant from the plaintiff on account of the purchase of a one-half interest in the Burner lode claim should be paid within thirty (30) days from date of said letter, June, 1889.

II.

The Court erred in permitting the defendant to testify over objection of plaintiff as to the contents of a certain letter claimed to have been written in June, 1889, by defendant to plaintiff without first demanding the original of the plaintiff, and without first showing the impossibility of defendant to produce the original or a copy of the said original letter.

III.

The Court erred in deciding that the offer of the defendant to purchase for the plaintiff a one-half interest in the Burner lode mining clalm was a mere voluntary offer, and binding on the defendant.

IV.

The Court erred in deciding that the plaintiff was not bound to take the one-half of the Burner lode claim from the defendant after his purchase, and at the price paid therefor by the defendant, to-wit, two thousand dollars.

V.

The Court erred in finding that the plaintiff waited too long after the purchase before tendering to the defendant the balance of the purchase price of the half interest in the Burner lode claim.

VI.

The Court erred in finding that the defendant had no authority from the plaintiff to pay more than fifteen hundred dollars for a one-half interest in the Burner lode Claim.

VII.

The Court erred in finding that the defendant ever wrote to the plaintiff or that plaintiff ever received at any time notice or a letter from the defendant that the balance of purchase price, to-wit, fifteen hundred dollars must be paid within thirty days.

VIII.

The Court erred in finding that there never was a ratification of the action of the defendant in purchasing the half interest in the Burner lode claim for two thousand dollars.

IX.

The Court erred in finding that the defendant after assuming to act for the plaintiff could waive his agency and keep the property for himself without first giving notice of such intention and tendering back the money received from the plaintiff.

X.

The Court erred in finding that the letter or notification sent

I hereby approve the above bond and the sufficiency of the sureties thereto.

HIRAM KNOWLES,

United States District Judge Presiding in Said Cause.

Endorsements: No. 60. In United States Circuit Court, Ninth Circuit. A. A. Wenham vs. W. S. Switzer, Defendant. Undertaking on Appeal. Filed December 17, 1892. George W. Sproule, Clerk.

United States of America, } ss.
District of Montana. }

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, Clerk of said Circuit Court, do hereby certify and return to the honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 112 pages, numbered consecutively from 1 to 112, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, testimony, exhibits and other proceedings in said cause, and of the whole thereof, as appear from the original records and files of said Court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Helena, in the District of Montana, this 8th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

[SEAL] GEORGE W. SPROULE, Clerk.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARTHUR A. WENHAM,
Appellant,

vs.

WILLIAM S. SWITZER,
Appellee.

BRIEF OF ROBT. B. SMITH,

Solicitor and Attorney for Appellant.

R. L. WORD,
Of Counsel.

ROBT. B. SMITH,
Solicitor and Attorney for Appellant.

C. K. WELLS CO., PRINTERS AND BINDERS, HELENA, MONT.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARTHUR A. WENHAM,
Appellant,

vs.

WILLIAM S. SWITZER,
Appellee.

BRIEF OF ROBT. B. SMITH,

Solicitor and Attorney for Appellant.

R. L. WORD,
Of Counsel.

STATEMENT OF THE CASE.

Plaintiff and appellant is now, and at all the times mentioned in the record was, a resident and citizen of Cleveland, in the State of Ohio, and the defendant and appellee is now, and at all the times mentioned in the pleadings or record, was a resident and citizen of Butte, in the State of Montana. Prior to October, 1887, these parties had been and were then co-partners or co-owners in the Alta Quartz Lode Mining Claim,

and were running the Monitor tunnel to develop the same. They had never met each other, and their acquaintance, though by correspondence only, was of several years duration, and in a business way was quite friendly and confidential. (See printed record, p. 22.)

The appellee was the manager of their joint mining enterprise at Butte City, Montana. Under these circumstances the appellee wrote to the appellant stating that a one-half interest in a good mining claim, which eventually turned out to be the Burner Lode, could be bought for about $1,500, and asking appellant if he knew of any one wishing to buy. Such correspondence was conducted between the appellant and appellee as resulted in the purchase by the appellee of the half interest in the Burner Lode. After the purchase the appellee refused to convey the property to the appellant, and this action is brought to compel the specific performance of the contract between the parties, and to compel the appellee to execute to the appellant a deed for the one-half undivided interest in the Burner Lode. The issues being joined, the trial was had before the Hon. Hiram Knowles, sitting without a jury. Such findings of fact and conclusions of law were reached by the Court that a decree was entered dismissing the appellant's bill, and entering a judgment for costs in favor of the defendant or appellee; and from the decree so rendered this appeal is prosecuted. The questions involved are as follows:

First: Did the defendant and appellee undertake to act

as the agent of the appellant in the purchase of a one-half interest in the Burner Lode Claim?

Second: Was he limited by the appellant to any particular sum to be expended, or was he to use his own judgment and make the best terms possible in the purchase?

Third: Did the defendant and appellee make the purchase of the one-half interest in the Burner Lode Claim for the benefit of the appellant?

Fourth: Was the action of the defendant and appellee in the purchase of the one-half of the Burner Lode Claim authorized or ratified by the Appellant within a reasonable time?

Fifth: Was the Appellee justified in disregarding the interest of his principal, and treating the purchase as his own without first notifying his principal of his intentions?

Sixth: Ought a specific performance be decreed?

The errors, both of fact and law, in the decision of the Judge below are assigned in the record, and are relied upon to reverse the decision, as follows:

ERRORS RELIED ON.

I.

The Court erred in allowing the Attorney for the defendant to ask the defendant leading questions as to whether or not the defendant wrote to the plaintiff, stating that the

full amount due to the defendant from the plaintiff on account of the purchase of a one-half interest in the Burner Lode Claim should be paid within thirty (30) days from date of said letter, June, 1888.

II.

The Court erred in permitting the defendant to testify over objection of plaintiff as to the contents of a certain letter, claimed to have been written in June, 1887, by defendant to plaintiff, without first demanding the original of the plaintiff, and without first showing the impossibility of defendant to produce the original or a copy of the said original letter.

IV.

The Court erred in deciding that the plaintiff was not bound to take the one-half of the Burner Lode Claim from the defendant after his purchase, and at the price paid therefor by the defendant, to-wit, two thousand dollars.

V.

The Court erred in finding that the plaintiff waited too long after the purchase before tendering to the defendant the balance of the purchase price of the half interest in the Burner Lode Claim.

VI.

The Court erred in finding that the defendant had no authority from the plaintiff to pay more than fifteen hundred dollars for a one-half interest in the Burner Lode Claim.

VII.

The Court erred in finding that the defendant ever wrote to the plaintiff, or that plaintiff ever received at any time notice or a letter from the defendant that the balance of purchase price, to-wit, fifteen hundred dollars, must be paid within thirty days.

VIII.

The Court erred in finding that there never was a ratification of the action of the defendant in purchasing the half interest in the Burner Lode Claim for two thousand dollars.

IX.

The Court erred in finding that the defendant, after assuming to act for the plaintiff, could waive his agency and keep the property for himself, without first giving notice of such intention and tendering back the money received from the plaintiff.

X.

The Court erred in finding that the letter or notification sent by plaintiff to the defendant in answer to defendant's letter of June 5th, 1888, accepting and ratifying the action of defendant in paying two thousand dollars for the half interest in the Burner Lode Claim was not a sufficient ratification of the acts of the defendant in that behalf.

XI.

The Court erred in finding that the plaintiff waited ten months to see whether or not he should ratify or accept the action of the defendant in purchasing the half interest in the Burner Lode.

XII.

The Court erred in finding that the failure of the plaintiff to send the remainder of the purchase price of the half interest in the Burner Lode Claim for ten months after its purchase operated as a forfeiture of any of his rights under said purchase.

XIII.

The Court erred in finding that the defendant had the right of his own accord, without notice to the plaintiff, to declare himself free from further obligation to the plaintiff on account of his agency, and assume to act for himself and retain the property originally purchased for the plaintiff and partially paid for by the plaintiff.

XIV.

The judgment, findings and decree of the Court is against the weight of the evidence, and is not supported by the evidence in said cause.

XV.

The decision, decree and findings of the Court is error in

that the same is against and contrary to the law and the correct rule of law upon the facts found and disclosed in said cause.

The matter of permitting Attorneys to ask leading questions is of course largely within the discretion of the Court, but this discretion should not be extended indefinitely, especially where the witness, as in this case, was a party to the suit. Leading questions that suggest the answer desired are to be avoided.

Greenleaf on Evidence, Vol. 1, Sec. 434.
Phillips on Evidence, Vol. 2. page 888.
People vs. Mather, 4 Wend., 229.
Warrell vs. Parmelee, 1 N. Y., 519.

It may be urged in answer to the above objection that the case was tried before the Judge, and that the rule, excluding leading questions, would be relaxed, and that it was discretionary with the trial Judge to permit or reject such mode of examination. While we admit the correctness of the proposition, we are constrained to believe that the method of examination of the defendant and witness, Switzer, as disclosed on pages 34 to 36 of the printed record, is indefensible and ought not to be allowed.

The Court over the objection of appellant's attorney permitted the defendant, Switzer, to testify to the contents of a certain letter, which he claimed to have written to the appellant sometime in June, 1888, without first demanding the

original or producing a copy of the letter, (see page 36 of record) and this is assigned as error No. II.

On page 64 of the printed record, the Judge in his opinion and findings, after quoting from the correspondence between appellant and appellee, uses this language:

"In this there is no authority to purchase this interest in "the Burner Lode for any amount to exceed fifteen hundred "dollars. Defendant could not bind plaintiff by any purchase "of that lode which involved an expenditure of any sum to "exceed that amount. * * * * As far as plaintiff is "concerned, he was not bound by any purchase of that prop- "erty for two thousand dollars."

This finding or conclusion of the Judge is assigned as error No. IV. Let us examine into the correspondence of these parties and ascertain whether or not this conclusion reached by the Court is correct, or is supported by the facts in evidence. Beginning with the first letter, found on page 47 of record, the defendant writes:

"Mr. Wenham, if you have a friend who desires one "half of a good claim lying alongside of the Alta Lode, which "I think can be had for $1,500, I wish you would let me "know. Sometime ago I bought one half of it. It cost him "$2000.00 thousand, he is not a miner the ground is softer "formation than where I am running our tunnel and can be "worked very easily, its sloping toward the creek and adjoin- "ing so the ores can be all run from it and all concentrated

"through our concentrator. It slopes north to our south line "of the Alta while our ground slopes south so sloping to- "gether its cheap I think, two large veins run lengthwise "through it east and west, same course as ours and please let "me know from now until spring is the time to pick up "property cheap, if you think a sale can be effected I will "send you a copy or a plat of it as it lays adjoining our "grounds the Alta lode claim, then any one can come out or I "will get a deed of it in the bank and the exchange can be "made either way, and I will get it cheap as any price can be "had for it."

In this letter the defendant says he "thinks it can be got for $1500.00," but he also says that it is a good claim and cost the owner $2,000. There is no proposition that he can or will buy it for $1500.00. All that he really promises is that he will "get it cheap as any price can be had for it." To this letter the appellant says he answered making inquiries about the claim.

No other letter passes till March 7, 1888, when appellee wrote, *inter alia:* "I think you will do well to secure the interest I spoke of joining the Alta." On the 15th of the same month the appellant wrote: "Now about the claim "adjoining the Alta. *I want to go in with you.* Could the "interest be bought for $1000.00. Friend Whitney will be "out to see you soon, I think. We could work the claim "after the Monitor was well under way; I suppose you would

"be in no hurry to develop that claim till after the tunnel was "complete."

Here is a positive declaration of the appellant that he wanted to go in with the appellee in purchasing the claim adjoining the Alta, and making some inquiries as to what price could be secured, and the method of working the same. There is no limitation of price to be paid, only asking if it is possible to secure it for $1000; but at the same time assuring the appellee that he wants to buy the interest and go in with the appellee.

Again on March 26th, only eleven days later, he writes, among other things, as follows: "If you should get the claim "adjoining the Alta all right, there is no hurry, as we could "not work it for some time to come. I suppose we could "sink a shaft on it to pay ore for about $2000.00, and if we "got the ore it would pay us well if the ore was rich enough, "as transportation is so close at hand it would not cost us "much to get the ore to the mill." In this the appellant says directly and positively, "if you get the claim adjoining the Alta all right." He had never as yet been informed as to the exact price it could be bought for. He was told it cost the owner $2000.00, but Switzer, the appellee, *thought* it could be gotten for $1500.00; and after writing to the appellee in a former letter that he, the appellant, wanted to buy the interest and go in with the appellee he here writes that "if he should get the claim adjoining the Alta all right." Is there any limitation as to price given to Switzer, and is he not told

that his purchase would be "*all right?*" The appellee is both authorized to act for appellant, and is left unlimited and uninstructed as to the price to pay. Appellant seems to have relied upon the assurance of appellee that he would get it as cheap as possible.

Again on April 5th, 1888, the appellant writes to appellee (See page 52 of trans.,) and closes his letter with this inquiry: "How about the claim adjoining the Alta claim? Can you secure the one-half you spoke of? Let me hear from you soon as practicable." Here is shown an anxiety on the part of appellant to secure the one-half interest in the claim, and no limitation as to price is placed upon the appellee.

Now what is the next step in these negotiations? In the next letter of Switzer to Wenham, dated April 13th, 1888, (page 51 of record), appellee says: "And in relation to the "interest in the claim adjoining the Alta, it can't be had for less "than about $1500 dollars if it can be bought for any price "but I shall know in about 20 days and I will write you as "soon as I can get to know what I can let you have it for. "He may get excited and ask more. * * * One thing "more if you conclude to take the interest you better send "$1500.00 dollars to the First National Bank of Butte as if "you wait it may slip in other hands. I am good for all "you send me."

On the 23d of April, 1888, appellant writes to appellee (see page 52 printed record) as follows:

"Dear Sir: Yours of the 13th at hand and contents "noted. According to your wishes I enclose you $500 pay- "able to your order. This is a New York draft and is as "good as gold at the First National Bank in your city; in fact "the Banks prefer drafts to currency. Now if you go quietly "to work and not let the party who wants to sell get excited, "when he agrees to sell, give him the $500, to bind the bar- "gain, and you can telegraph me for the other $1000 which "I will send immediately on receipt of notice, and if you can't "buy all of his interest buy half of it." * * * * In "regard to the claim next the Alta please keep it confidential "until something is done; and by the way what is the name "of the claim?"

Here is a portion of the money forwarded to Switzer, with instructions how to proceed to purchase the property, and a promise to remit the balance if bargain is made, and positive instructions to buy the interest, and if unable to *get all of it to get one-half of the interest*. Is there any doubt of the willingness and desire of the appellant to procure this property? It may be and perhaps is true that appellant desired to purchase as cheap as possible, but he seems to trust that matter to the judgement of Switzer, who was on the ground and familiar with the property.

So far there is nothing in all this correspondence that could be distorted into the idea that Switzer was limited to $1500 as the price to be paid for the half intertest in the claim. Let us follow it to the conclusion. On April 28th,

1888, Switzer writes to Wenham as follows: (See record, p. 53.) "My Dear Sir—Yours of 23rd, 88, is received with "one check of $500 dollars on the First National Bank of "Cleveland, Ohio, the mining lode claim is known as the "Ontario or Burner Lode mining claim. Soon as I can hear "from the party the matter will be concluded: the money is "in Bank."

Here no complaint or objection is made on the part of appellee that $500 instead of $1,500 had been sent. *He agrees and promises to conclude the purchase as soon as he can hear from the party or owner.* The fact that only $500 was sent made no material difference. The appellee said he understood appellant was a monied man (see page 36 of record.) For this reason we presume the appellee found no fault, and was willing to make the purchase and rely on the appellant to pay the balance of the price, whatever it might be.

On the 5th of June, 1888, the appellee wrote to the appellant (see p. 54 record):

"In relation to the Burner mining property I have got it "all and paid for it, and surveyed it for patent but am doing "$100 worth of work so as to have over $600 worth of work "which will be a necessary improvement. I am sure of two "veins on the ground. But it cost more than $1,500. It all "cost me about $4,000 all told, but I was determined to have "it if it cost more. It will pay to hold when patented. "Property is rising in Park Canyon. Under the circumstan-

"ces I had to take a deed in my own name, and of course had "to pay for it on delivery of the deed, and came near "losing it at that; others would take it at higher figures. "Now, friend A. A. Wenham, send me $1,500, and I will "make you a deed of one undivided one-half of the entire "Burner property free of all work excepting the one hundred "which I am now doing, which work will be over $600—suf- "ficient to get the patent; then you will have to stand one- "half the expenses of the patent which only is the regular "prices in this district and territory. As I have received $500 "of you, so the balance, $1,500, will make the purchase money "of your part $2,000. I will (write) you more in detail next "letter."

In this letter the appellee discloses all through it the fact of his agency, and acknowledges that the $500, theretofore received, by him from the appellant, had been applied toward the payment of the purchase price of the half interest bought for the appellant. Herein he also discloses the full cost as being $2,000.00, and promises to make a deed on receipt of the balance, $1,500. Nor does the appellant indicate any time within which the money advanced by him should be repaid by the appellant. This is the last letter written until April 6, 1889. It is true the appellant says he wrote ratifying the action of the appellee in the purchase, and asking for plat and description of the property, and asking the full amount of balance due, including assessment work and cost of procuring patent; and the defendant testifies to writing a letter stating

the money must be paid in thirty days. These two letters, if written were not received by either party. According to the evidence and considering the manner of defendant's testimony on this point it is doubtful if he ever wrote such a letter, and it is certain that the appellant never received it, for his refusal to send the money in thirty days if he had received such notice would be wholly inconsistent with his previous conduct and anxiety to purchase the property, especially as he had advanced already $500 and balance was only $1500. So we can confidently dismiss this point with the statement that the defendant never wrote demanding the money in thirty days, and that the finding of the Court that the plaintiff or appellant was not bound to take the property at the price of two thousand dollars is erroneous, and is not supported by the weight of evidence and is against the law as correctly applied to the facts. The principal is always bound by the acts of his agent when his acts are within the scope of his authority, whether the agent be general or special.

Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 959.
Kent's Com., Vol. 2, side page 614, et seq.
Story on Agency, Secs. 170 and 373.
Am. and Eng. Cy. of Law, Vol. 1, page 428.
Muller vs. Pondix, 55 N. Y., 340–1.
Travis on the Law of Sales, Vol. 1, pp. 591–2.
Law vs. Cross, 1 Black, 533–6, U. S.
Hoyt vs. Thompson, 19 N. Y., 218.

The fact that the appellant was informed by the letter of June 5th, 1888, written by the appellee, and giving in full

detail the purchase he had made and the price paid for the property, and that after being thus informed of the transaction, he remained silent knowing that defendant had paid two thousand dollars for the property, and that he did not immediately repudiate the acts of defendant in making the purchase, bound him to take the property at the price paid by the appellee or defendant. On this point the Supreme Court of the United States in Law vs. Cross, 1 Black 533, says: "When informed by his agent of what he had done, if the "principal did not choose to affirm the act, it was his duty to "give *immediate* information of his repudiation. He cannot, "by holding his peace and apparent acquiescence, have the "benefit of the contract if it should afterwards turn out to be "profitable, and retain a right to repudiate if otherwise. The "principal must therefore, when informed, reject within a rea- "sonable time, or be deemed to adopt by acquiescence. The "rule is said to be a stringent one upon the principal in such "cases, where with a full knowledge of the acts of the agent, "he receives a benefit from them, and fails to repudiate the "acts."

This rule of law is almost universal, and the citation of a few authorities, in addition to the above, we deem sufficient to sustain the position.

Field vs. Farrington, 10 Wallace, 141.
Southern Life Insurance Co. vs. McCain, 96 U. S., 84.
Travis on Sales and Collateral Subjects, Vol. 1, p. 626.
Hoyt vs. Thompson, 19 N. Y., 218.

Metcalf vs. Williams, 144 Mass., 452.
Foster vs. Rockwell, 104 Mass., 171-2.
Matthews vs. Fuller, 123 Mass., 446.
Lorie vs. North Chicago City Ry. Co., 32 Fed., 270,
Sherwood vs. Sissa, 5 Nev. 352.

Among other things the Court found that the appellant waited too long after knowledge of the purchase before ratifying the action of appellee and tendering the balance of the purchase money, and that there never was a ratification of the action of the defendant or appellee in making the purchase at the price of two thousand dollars. These conclusions of the Court are assigned as error in Assignments Nos. V. and VIII. and in the exceptions taken on the trial. These propositions have been more or less discussed in the preceding part of this argument, wherein we have sought to show that the plaintiff or appellant by his letters of instruction to the appellee, and by his silence in not repudiating the action of the defendant, bound himself to take the property and pay therefor the price paid by his agent.

In this case it is shown that the appellant as early as April, 1888, and before the interest in the Burner Lode was bought (See trans., p. 52), sent $500 to the defendant to be applied toward the purchase of the identical property, with instructions as to the method of proceeding. This money was received, and when the purchase was made the same was used by the defendant in part payment for the property. The residue of the purchase price was furnished by the defendant

out of his own funds. (See record, pp. 54-55.) This the appellee had a right to do, if he saw fit to advance the necessary funds: and he could look to his principal to be reimbursed, with interest on the sum advanced: and his measure of damages in such cases is the sum advanced, with lawful interest. and his commissions, if any; but in the present case there is no claim for commission, nor was the payment of commission for services considered or contemplated by either party. Therefore the only claim which the appellee could lawfully assert against the appellent on account of the transaction is the repayment of this sum with legal interest.

Story on Agency, Sec. 74, note.
Story on Agency, Secs. 335-338.
Meech vs. Smith, 7 Wend., 315.
Wharton on Agency and Agents, Chap. 5, Sec. 316.
Kent's Com., Vol. 2, side pp. 634.
Gillett vs. VanRensellaer, 15 N. Y., 399.
Sedgwick on Damages, 8th Ed. Vol. 1., Sec. 304.
Hidden vs. Jordan, 21 Cal., 93.
Green vs. Clark, 31 Cal., 591.
Marzion vs. Pioche, 8 Cal., 536.

Believing as we do that it is fully established that where an agent furnishes money or funds, or a part of the funds necessary to complete a purchase for the principal that his only right or claim is for the sum advanced, with interest, and his charges or commission if any there be, we will proceed to the consideration of other points and errors relied on.

In the VIth assignment exception is taken to the finding

of the Court that the defendant had no authority to pay more than fifteen hundred dollars for the half interest in the Burner lode claim. This question we have already discussed and quoted from the several letters, showing conclusively as we claim that there was *no limitation* on the appellee as to the price to be paid. In fact he was permitted largely to use his own discretion in the purchase, and having done so the appellant would be bound by the contract, even if he should try to avoid it, but in this case the appellant is not now and never has expressed any desire or shown any disposition to repudiate the action of the appellee in making the purchase. On the other hand the appellant is seeking in this case to compel the defendant or agent to comply with his own contract, and make a deed for the interest bought by the appellee for the use of the appellant. All of the purchase money expended by the defendant, together with legal interest at 10 per cent per annum, with sixty dollars additional, was paid and tendered to the defendant to cover all advances and interest. (See record, pp. 20 and 21, evidence of Stapleton); and in addition to this, one hundred and fifty dollars was tendered to cover one half of cost of assessment work and procuring a patent from United States.

Recurring again to the question of the ratification of the action of the appellee in paying two thousand dollars, the Court below uses this language: "As defendant had under-"taken to act as an agent for plaintiff, he was required to be "loyal to his trust, and not act for himself, but I do not

"think he was required to wait indefinitely to see whether "plaintiff would ratify his action in paying two thousand dol- "lars for the property. Plaintiff should have ratified the ac- "tion of the defendant within a reasonable time."

This language and the result reached by the Court is excepted to and assigned as error in assignments Nos. VIII., XI. and XII. Here the Court falls into the unaccountable error of supposing or assuming that after the plaintiff had been fully notified by his agent of what he had done in relation to the purchase of the property, and the price paid, that in order to confirm the acts of his agent it was necessary to give notice of his acquiescence in the terms of the transaction, when the law is directly contrary to this position; the true rule being that when an agent exceeds his authority or acts contrary to instructions or different from the usual custom or what might be expected under the known circumstances, if he notified his principal in full of all his actions, unless the principal immediately repudiates the same, he is deemed to have fully concurred in and ratified such act of his agent by his silence. (See authorities cited supra.) Plaintiff did not wait ten months to ratify the conduct of the defendant. The very fact that he did not at once repudiate the action of Switzer, upon notice from him of what he had done, was a complete legal and moral ratification of all the acts of the appellee. Suppose, for the sake of argument, that the defendant, Switzer, after having paid two thousand dollars for the property, and having written the letter which he did write on June 5th, 1888,

and receiving no answer from the plaintiff, should bring his action to recover $1,500, advanced by him on account of the plaintiff in this purchase, with interest thereon, and tender or offer to convey one-half the Burner Lode to Wenham, is there a Court of Equity in the United States that would not grant him relief instanter upon the facts as disclosed in this case? We think not. His rights and equities would be too clear to admit of doubt. Every jurist in the country would decide that Wenham's silence was a ratification of the actions of Switzer. How then can it be said that Wenham waited too long, or an unreasonable time to ratify. It might pertinetly be said that he had waited too long or an unreasonable time to repudiate. The maxim, *qui tacet consentire videtur*, or this—"*A man who does not speak when he ought shall not be heard when he desires to speak*," would apply to such a case with full force. Plaintiff's silence is regarded as a perfect ratification of the actions of Switzer, and in finding there was no ratification by Wenham of the purchase as consummated by defendant, the Court committed an error of law from which appellant asks to be relieved.

The learned Judge also made another finding and decision subject to a legal criticism, which we claim ought to entitle the appellant to a judgment on the facts. It is shown in appellee's letter of June 5th, 1888, that he used $500 of the appellant's money and fifteen hundred dollars of his own funds in paying for the half interest in the mine. The Court says as follows: "It appears to me the delay of about ten months

"in ratifying the action of defendant by plaintiff as he should "have done by paying to defendant the money he had ex- "pended, was unreasonable, and that *defendant had the right* "to maintain that plaintiff had left him to shoulder the respon- "sibility he had assumed, and *to treat the purchase as his own.*"

Here as before the Court assumes there was no ratification or responsibility assumed by the silence of the plaintiff, whereas we have fully shown that silence was one of the very best ways of ratifying defendant's actions. But this is not the worst feature; the Court says: "The *defendant had the right* "to maintain that plaintiff had left him to shoulder the respon- "sibility he had assumed and to *treat the purchase as his own.*" This doctrine announced by the Court, if adopted, would lead to much fraud and confusion, and the rights of parties as principal or agent could and most frequently would be decided by the whims and caprices of human nature. The relation of the agent to the principal is not unlike the position of trustee and *ces tue que trust*, and where real estate or lands has been purchased by the agent for the principal with funds partly furnished by his principal and the residue advanced by the agent, and the agent takes the title to such lands in his own name, he holds such title in trust for his beneficiary, nor can he at his own instance, without notice to the principal, renounce his agency or trust and treat the purchase as one originally made for himself. In such cases the utmost good faith and loyalty to the interest of the principal must be

shown. And the agent or trustee cannot betray his trust and take advantage of his position.

Heldman vs, Mesmer, 75 Cal., 170.
Walton vs. Karnes, 67 Cal., 257.
Royd vs. McLean, 1 John. Chan., 582.
Story's Equity Jurisprudence, Vol. 2, Sec. 1201.
Boskowitz vs. Davis, 12 Nev., 457-8.
Hardenbergh vs. Bacon, 33 Cal., 356.
Rubidœx vs. Parks, 48 Cal., 215,
Rothwell vs. Dewees, 2 Black, 613, U. S.
Massie vs, Watts, 6 Cranch, 148.
Dutton vs. Willner, 52 N. Y., 319.
Story on Agency, Sec. 207.

The agent stands in the relation of a trustee, and if such relation is once established it continues as long as he has possession or control of the particular property about which the trust arose. The agent may have a lien on the property or estate in his name or possession for the advancements made, but he cannot violate his trust and assume to act for himself, though he might offer to return the principal's funds used in making the purchase. The principal is entitled to all the benefits accruing by reason of any transaction of his agent, and the agent must always account to the principal for property purchased in his behalf. Nor can he appropriate his principal's property, or sell the same at his own instance to secure advances made by him, without first demanding the same of his principal, except in matters governed by custom or law merchant.

In the case at bar, although the defendant, Switzer, advanced a portion of the money to buy the one-half of the Burner Lode Claim in June, 1888, he never demanded the same nor complained of the non-payment for one whole year. No letter or correspondence passed between the parties, *that is proven* by a bare preponderance of the evidence, until April 6th, 1889, when plaintiff wrote making inquiry why he had not heard from defendant and enclosing one thousand dollars to the appellee. (See record, p. 55). This letter was received by the defendant at Butte City, Montana, it is to be presumed, in the usual time of transmitting a letter from Cleveland, Ohio, to Butte, Montana, and yet it remains unanswered until May 30th, 1889, or nearly two months after its receipt, and in all this dreary silence from June 5th, 1888, to May 30th, 1889, the defendant had not demanded the amount advanced by him, nor had he offered to return the five hundred dollars advanced by Wenham and used by the defendant in purchasing this property. And in his letter of May 30th, 1889, he does not intimate that he had notified Wenham that the money must be paid in thirty days. Such conduct is inexplicable with the statement that he wrote stating the money advanced by him must be returned within thirty days. Even after receiving the one thousand dollars, inclosed in letter of April 6th, 1889, it seems to have taken nearly two months for the defendant to make up his mind to violate his contract. But as he testified in his cross-examination that property was rising in Park Canyon (See printed record, p. 40) we pre-

sume this may have had something to do with his final decision not to make the deed, although he denies the soft impeachment.

There is one other question we simply desire to refer to, and it is this.—In the bill it is alleged that the contract between the plaintiff and the defendant was that defendant was to purchase the Burner Lode Claim; one-half of which claim was to be bought for the benefit of the plaintiff. There was a slight variance between this and the proof, as the evidence tended to show that the defendant had already bought one-half of the claim for himself, and the real fact is he undertook to buy the other half for the plaintiff. This variance we do not deem material or fatal, because the object of the suit is to recover or compel the defendant to convey one-half of the mine to the plaintiff, the contract of agency in any event as between the plaintiff and the defendant effects only one-half of the Burner Lode Claim, and it was not material whether the half purchased for the plaintiff was bought by the defendant at the same time he bought one-half for himself, or at a different time. It did not change his contract to buy *one-half* for the plaintiff. One-half of the claim is all that is involved in this suit, and one-half of the Burner Lode is all that defendant ever agreed to purchase for the plaintiff. It is immaterial whether he bought it at the same or at a different time from his own purchase of one-half, and the evidence, we contend, differing only in this respect from the bill, is immaterial. The defendant was not misled by the bill, nor was

there any objection or demurrer to the introduction of plaintiff's evidence or proof on the trial. It would seem to us that the failure of the defendant's counsel to object to the evidence, offered by the plaintiff in support of his bill (if there was any variance at all) would now preclude them from raising it here for the first time. We do not assume that the defendant's counsel will refer to or urge this question before this Court, but as the judge below incidentally refers to this matter, although not deeming it of sufficient force to base his opinion on, we have noticed it here.

The defendant made no objection to the contract as pleaded when he filed his answer in the cause. In fact, in paragraphs six, seven and eight of his answer, the defendant affirmatively admits that the contract as pleaded by the plaintiff, viz., *the purchase of the Burner Lode Claim* instead of a *one-half* thereof, to be the contract made. If the defendant meant to rely on, or take advantage of the difference between the contract as plead by the plaintiff, and the real contract as understood by the defendant, it was obligatory on him to plead the contract as understood by him and offer to perform it. This not being done, and no objection being interposed on the trial to the evidence offered by the plaintiff to support his bill, advantage cannot now be taken of this difference; but as the evidence introduced met with all the requirements of the prayer of the complaint, and the specific performance demanded and prayed for could be performed by the defendant, according to the proof offered, there was no

material variance between the facts as alleged in the bill and the evidence offered to support it.

Mortimer vs. Orchard, 2 Ves. Jr., 245.
London & Birmingham Railway Co., vs. Winter, Cr. & Phill., 57.
Smith vs. Wheatcraft, 9 Ch. D., 223.
Meaks Van Santvoord's Pleadings, pp. 832–838–9.
Crawford vs. The William Penn, 3 Wash. C. C., 484.
Meaks Van Santvoord's Pleadings, p. 845.
Story's Equity Pleadings, Sec. 394 (Note A.)

In the case of *Crawford vs. The William Penn, supra*, the Court laid down this rule in determining the matter of variance between the allegations in the bill and the evidence introduced: "If either party mistakes in setting out his cause "of action, and yet not so as to *mislead the other party*, the "Court will notwithstanding proceed to make a decree disre- "garding the variance between the pleadings and the proof."

In the case at bar there is no claim that the appellee was in any manner misled by the case as stated in the bill. There was no material variance to mislead, nor was objection made to the proof offered. This must have been done on the trial to avail here.

Maxwell on Pleadings, p. 571.
Bell vs. Knowles, 45 Cal., 193.
Tyng vs. Co. Warehouse Co., 58 N. Y., 308.
Chamblee vs. McKenzie, 31 Ark., 155.
Nelson vs. Thompson, 23 Minn., 508.

Believing that every possible objection to the case, as

made out by the plaintiff on the trial, has been covered by us in this, our brief, we ask that the judgment of the Court below be reversed, and a decree for the plaintiff be ordered in accordance with the prayer of the bill.

ROBT. B. SMITH,

Solicitor and Attorney for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARTHUR A. WENHAM,
Appellant,
vs.
WLLIAM S. SWITZER,
Appellee.

BRIEF OF AARON H. NELSON,

Solicitor and Attorney for Appellee.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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vs.
WLLIAM S. SWITZER,
Appellee.

BRIEF OF A. H. NELSON,

Solicitor and Attorney for Appellee.

STATEMENT OF THE CASE.

Brief of Counsel for Appellant is erroneous, both in omission and statement, in its presentation of the facts out of which this litigation has arisen. These errors are material and are:

First: In omitting to state that when Appellee (Defendant below) began the correspondence in this case by his letter

of October 2d, 1887, addressed to the Appellant (Plaintiff below) he, said Defendant, was already the owner of a half interest in the claim in controversy, and the possibility of his (Defendant's) being able to purchase the other one-half of said claim for Plaintiff, or for any friend of Plaintiff's, and for the sum of $1,500, was all that there was in the offer of the Defendant upon which this suit is founded.

Second: The final purchase of the second half of the claim in controversy was not (as counsel for Appellant states) the result of the correspondence between Plaintiff and Defendant, but was the accomplishment of Defendant's constant purpose—antedating even the beginning of his correspondence with Plaintiff—"to buy the ground whether he (Plaintiff below) took an interest or not." (See page 40 of Transcript.) With these amendments we accept Appellant's statement of the case.

ARGUMENT.

Appellant's first and second specifications of error are, by his own acknowledgement, untenable as grounds for reversal of the decision appealed from, the matter of allowing leading questions to be asked (especially in equity proceedings) being largely within the discretion of the Court.

Rice on Evidence, 1, Section 284.

In this case, however, the Court below ignored all the testimony elicited by such leading questions, using this language regarding the alleged letters, to which alone such questions referred: "But whether he wrote such letters or not," etc. This statement in the decision appealed from also directly contradicts the allegation of Appellant's seventh specification of error.

There remain, therefore, twelve specifications of error (out of the fifteen assigned in the decision below) for our consideration, and these, originating from the erroneous theory of Appellant that the transaction in question was *a contract creating an agency*, may all be considered at once by answering the sixth and last in the series of questions which Appellant states to be involved in this controversy, that being in point of fact first in importance, and comprehensive of all the others.

"Ought a specific performance be decreed?" asks Appellant's Counsel of this Court, and we are not venturing to put words in the mouth of the Court when we reply, "Certainly not, if no contract, either executed or executory, existed between these litigants at the time of the filing of the Plaintiff's bill in the Court below." "*Ex nudo pacto non oritur actio.*"

Not every agreement is a contract, and to the creation of every legal contract, three factors, jointly and severally essential to such legality, must be contributed. "First, the reciprocal or mutual assent of two or more persons; Second, a good and valid consideration; and Third, something to be done or omitted which is the object of the contract."

Chitty on Contracts, Vol. 1, page 11.

FIRST: then as to the "reciprocal or mutual assent" of the parties to this suit, which assent must be either clearly expressed or, by implication, must be plainly deducible from their correspondence.

The initial step in the transaction now in dispute is the proposition found in Defendant's letter to Plaintiff, dated October 2, 1887, as follows:

"Mr. Wenham, if you have a friend who desires half of a good claim lying alongside the Alta Lode, which I think can be got for $1,500, I wish you would let me know. Some time ago I bought one-half of it. It cost him $2,000. If you think a sale can be effected I will send you a copy or a plat of it, as it lays adjoining our ground, the Alta Lode claim, then you can come out or I will get a deed of it in the bank and the exchange can be made either way, and I will get it cheap, as any price can be had for it." (See exhibit 3, pages 47 and 48 of Transcript.)

That offer, and that offer alone, is alleged in the bill initiating this suit, as the origin of the contract of which Plaintiff demands specific performance. It appears, however, from the record that in a letter dated March 7th, 1888, Defendant wrote to Plaintiff, and (apparently alluding to his former letter of October 2d, 1887) said: "I think you will do well to secure the interest I spoke of, adjoining the Alta claim." (See exhibit 4, page 49, Transcript.) To that letter Plaintiff replied under date of March 15, 1888, and (in regard to the mining claim now in controversy) wrote: "Now, about the claim adjoining the Alta. *I want to go in with you. Could the interest be bought for $1,000?*" (See exhibit 5, page 49 of Transcript.) And again, under date of March 26th, 1888, Plaintiff wrote to Defendant, and regarding this claim said: "*If you should get the claim adjoining the Alta, all right; there is no hurry. We could not work it for some time to come.*" (See exhibit 6, page 50 of Transcript.) In reply to this letter of Plaintiff's, Defendant wrote, under date of April 13th, 1888, as follows: "And in relation to the interest nearest the Alta, it can't be had for less than about $1,500, *if it can be bought at any price*, but I shall know in about twenty days, and *I will write you as soon as I can get to know what I can let you have*

it for. He may get excited and ask more," and by way of postscript to the same letter Defendant adds; "One thing more, *if you conclude to take the interest* you had better send $1,500 to the First National Bank of Butte, as if you wait, it may slip in other hands." (See exhibit 7, page 51 Transcript.) This letter seems to have been intended also as a reply to a letter from Plaintiff, dated April 5th, 1888, in which he (Plaintiff) asks: "How about the claim adjoining the Alta claim. Can you secure the half you spoke of? Let me hear from you as soon as practicable." (See exhibit 8, page 52 Transcript.) Under date of April 23d, 1888, Plaintiff wrote to Defendant as follows: "Yours of the 13th at hand and contents noted. *According to your wishes I enclose you $500*, payable to your order. This is a New York draft and is as good as gold in the First National Bank in your city. In fact, the banks prefer drafts to currency. Now if you go quietly to work, and not let the parties who want to sell get excited, when he agrees to sell give him the $500 to bind the bargain, *and you can telegraph me for the other $1,000*, which I will send immediately on receipt of the notice, and if you can't buy all of his interest buy one-half of it. * * * * In regard to the claim next to the Alta, please keep it confidential until something is done; and by the way, what is the name of the claim? Please answer as soon as possible, that I may know you have received the money." And in a postscript to this letter Plaintiff adds: "If you did not want to use the money immediately you could make a special deposit in the bank until you needed it." (See exhibit 9, page 52 Transcript.) April 28th, 1888, Defendant replied to Plaintiff's letter of April 23d 1888, and regarding the claim in controversy wrote as follows: "Yours of the 23d, '88, is received,

with one check for $500 on the First National Bank of Cleveland, Ohio. The mining lode claim is known as the 'Ontario' or 'Burner Lode Claim.' Soon as I can hear from the parties the matter will be concluded. The money is in bank." (See exhibit 10, page 53 Transcript.)

Here let us pause to ask, where in these citations from the record is there the slightest proof discernible, that either Plaintiff or Defendant knew for what sum the one-half interest in the claim, concerning which they were corresponding, could be bought? Up to this date we find nothing more certain upon that point than that Defendant was confident *it could not be had for less than $1,500.* He did not, however, know that it could be bought for that sum. Is it not, therefore, evident that (in direct contradiction of the allegations of the Plaintiff's bill) on or prior to April 13th, 1888, nothing was done or had been done or written by Plaintiff, in which the "mutuality of the assent" essential on his part, to the alleged contract, is proven, or from which it could possibly be inferred? This being true of the Plaintiff, it must of necessity be equally true of the Defendant, unless it be the theory of the Plaintiff, that somewhere in the correspondence he clothed the Defendant with plenary power as the purchase price of the interest in question, that is that he employed Defendant to buy for him one-half the Burner lode claim, giving him *carte blanche* as to purchase price.

Such a theory, however, is wholly untenable in view of the correspondence between the parties as a whole, and is flatly contradicted by Plaintiff's proposition in his letter of April 23rd, 1888, that Defendant shall buy "one-half" of the half interest, or an undivided one-quarter interest, if he can not get the entire one-half interest for $1,500.

Thus far Defendant had not written "I can buy a one-half interest in the Burner lode claim for $1,500," or for any other sum, "shall I buy it for you?" No definite sum at which the one-half interest in question could certainly be secured being known at that date, the assent of the Plaintiff to the purchase of such one-half by Defendant for Plaintiff could not have been given prior to April 13th, 1888. "The parties must assent to the same thing in the same sense; the minds of both must meet as to the same thing."

Hartford, etc., R. R. Co. vs. Jackson, 63 Amer. Dec., 177.

Had the Plaintiff, in accordance with the proposition of the Defendant as made in the postscript to his (Defendant's) letter of April 13th, made to Defendant a legal tender of $1,500 — which sum Defendant suggested that Plaintiff had better send him if he concluded to take an interest in the claim—then the assent of the Plaintiff, the *sine qua non* on his part, in the first essential factor in the alleged contract, *might perhaps be a legal inference from such tender*, but when instead of such full legal tender of $1,500, Plaintiff sent Defendant, under date of April 23rd, 1888, *merely a bank draft for $500*, drawn by the First National Bank of Cleveland, Ohio, upon some bank in New York (see exhibit 9 and 10, pages 52 and 53 of Transcript), and instructs Defendant to telegraph him "for the other $1,000," saying at the same time," "If you can't buy all of his interest (clearly for $1,500 but no more), buy half of it," it is as plain as the sun at noonday in a cloudless sky, that at the date we have reached in our review of the record in this case, no assent of the Plaintiff had ever been given either positively or definitely nor even impliedly by any inference however finely drawn, to a purchase of the interest herein involved for any greater sum than $1,500.

Passing now to the second stage in this transaction (for the negotiations between these parties is clearly separable into two periods), it appears from the record that some time in May, 1888, Defendant finally purchased the one-half interest in dispute in the Burner lode mining claim, but, contrary to the allegation upon that point in Appellant's brief, *without using in making such payment any money belonging to Plaintiff*, the $500 sent to Defendant by Plaintiff with the latter's letter of April 23rd, 1888, being on June 5th, 1888, (some time after the purchase of the one-half interest in dispute had been completed) still in the bank in the same form in which it was received, that is, as a draft on a New York bank drawn by the First National Bank of Cleveland (see pages 39, 41 and 42, and exhibit 12, page 55 of Transcript). If, however, defendant had used the $500, then in his hands but belonging to plaintiff, as part of the purchase price of the one-half interest in question, he could not thereafter have maintained an action against Plaintiff to compel him to take the one-half interest so purchased at any higher figure than $1,500. "A *special* agent who is employed about one specific act, or certain specific acts only, does not bind his principal unless his authority be strictly pursued."

Dunlap's Paley on Agency, 201.

June 5th, 1888, Defendant wrote to Plaintiff, *and for the first time in the history of this transaction made a definite offer of the partnership with plaintiff in the Burner lode mining claim. Of partnership* we say, and not of *agency*, the latter being the erroneous theory upon which the Defendant in this case has proceeded from the first, as is clearly shown by the fact that the bill of complaint herein alleges that a contract was entered into between the parties, whereby Defend-

ant agreed to purchase the entire Burner lode mining claim for the joint benefit of himself and Plaintiff, while the evidence shows that the Defendant from the very beginning of his negotiations with Plaintiff and prior thereto owned an undivided one-half interest in the claim.

Now as to this definite offer of Defendant, its nature, its terms; and whether in this offer, and Plaintiff's action and inaction thereon, any more than in the first very indefinite proposition and Plaintiff's cunning dallying therewith, there is disclosed that "reciprocal and mutual assent of the parties" without which no contract can be created?

In his letter of June 5th, 1888, Defendant writes as follows: "In relation to the Burner mining property, *I have got it all and paid for it*, and surveyed for patent, but am doing $100 worth of work so as to have over $600 worth of work, which will be a necessary improvement. I am sure of two veins on the ground, but it cost more than $1,500. It all cost me about $4,000, all told, *but I was determined to have it if it cost more. Property is rising in Park canyon.* Under the circumstances I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near losing it at that. Others would take it at higher figures. *Now friend A. A. Wenham, send me $1,500, and I will make you a deed of an undivided one-half of the entire Burner property, free of all work excepting the $100 which I am now doing, which will be over $600, sufficient to get the patent;* then you will have to stand one-half the expenses of the patent, which only is the regular price in this district and territory. *As I have received $500 from* you, so the balance, $1,500, will make the purchase money of your part $2,000. I will you more in detail in my next letter." (See exhibit 12, page 54 Transcript.)

While this letter is in transit from Butte, Montana, to Cleveland, Ohio, a letter from Plaintiff to Defendant, dated June 4th, 1888, was on its way from the latter to the former city. In that letter Plaintiff refers to the $500 draft sent to Defendant by letter of April 23rd, 1888, as "the $500 I have in your care," and "the money I have with you," (see exhibit 15, page 57 Transcript) clearly showing that Plaintiff did not consider that the remittance made by him on April 23rd, 1888, to Defendant, was on account of purchase of the half interest in question *without limit*, as it must necessarily have been to sustain the theory of Appellant's counsel in this suit, but that the $500, though then in the hands of the Defendant, was still the personal property of Plaintiff; merely a payment on account "with a string to it," which he could still dispose of as he chose, and in proof thereof he proposed in said letter of June 4th, 1888, that the said $500 should be loaned to one C. C. Frost.

And now we ask when, and how, if at any time, or in any manner, did Plaintiff accept this first and definite offer of the Defendant as presented in his letter of June 5th, 1888?

It is not disputed that Plaintiff remained absolutely silent as to the acceptance or rejection of said offer until April 6th, 1889, just ten months from the date such offer was made. What does he then do? Does he write, "Your offer of June 5th, 1888, to sell me the one-half interest in the Burner lode claim for $2,000 is received, I accept the offer?" Nothing of the kind. On the contrary, after so long delay he writes a letter worthy the diplomatic astuteness of a Talleyrand, the artful duplicity of Rodin, and the alleged crafty ambiguity of a Pickwick. A noteworthy letter indeed it is. Noteworthy more for what it conceals than for what it states. Here it is,

dated April 6th, 1889: "*Not having heard from you since some time last April or May*, I have felt as though you had neglected *my last letter, written some time in the early part of June last.* However, as you are the senior, I accept the situation. I enclose check on New York for $1,000. Please let me know how much you figured to be the balance. You now have fifteen hundred ($1,500) dollars in total from me. *I have thought it quite strange that I have not heard from you.* However, I supposed that you would write when you were ready, but as it was a matter of business, I thought it my duty to write to you now, *as time was drawing close.* I hope you enjoy good health and that your tunnel is progressing as well as could be expected. I hope some day you may reap a rich harvest out of your enterprises. Still such enterprises and their results, are only temporary, we cannot take the results of our material labors with us, but our spiritual labor's development we carry with us into an indefinite eternity." (See exhibit 13, page 55 of Transcript.)

The very first statement is directly contradicted by the record, and Plaintiff's attempted explanation of that contradiction (see pages 30 and 31, Transcript) cannot satisfy this Court, any more than it did the Court below, however satisfactory it may have been to the witness. Yet it is this letter that Appellant's Counsel holds up before this Court and unblushingly says: "The Court (below) erred in finding that there never was a ratification of the action of the Defendant in purchasing the half interest in the Burner lode claim for $2,000." (See eighth specification of error.) It is this letter that is claimed as evidence proving the assent of the Plaintiff to the proposition of the Defendant by letter of June 5th, 1888, and yet it opens with an indirect and specious denial of the receipt

of the very proposition it is claimed to accept. A most evident *suppressio veri* the legal equivalent of a *suggestio falsi.*

With Defendant's letter of June 5th in his possession, in which he had been clearly and definitely advised that Defendant had been "obliged" to take a deed to himself for the half interest in the Burner lode claim, about which he had therefore been corresponding, "obliged," Defendant says, because, as he testifies, "I had no money of his (Plaintiff's) that I could use (See page 39 of Transcript); but that Defendant was willing to sell to him (not purchase for him) a one-half interest, (of which he, Defendant, was sole owner,) for the sum of $2,000, and to allow him credit on that price for the $500, which Plaintiff had the very day before written of to Defendant as "the money I have with you," Defendant saying further that, *upon receipt of $1,500* more he would deed to the Plaintiff an undivided one-half interest in the Burner lode claim; with such a definite and distinct offer as that in his possession, and after retaining it for nearly ten months he writes under date of April 6th, 1889, *and denies, with words most cunningly and carefully chosen, the receipt of any such offer*, at the same time expressly referring to his own letter of June 4th, 1888, which it now appears crossed in the mails Defendant's letter of June 5th, 1888. It would not do at that late date, (if it had been a fact that Plaintiff had heard nothing from Defendant about this matter from April or May of 1888, when the extreme known limit of the purchase price of this interest had been $1,500 until April 6th, 1889,) to send defendant $1,000, and at the same time to couple with an indirect denial of the receipt of the Defendant's letter stating that he must pay $2,000 for the one-half interest, the deceptive inquiry, "Please let me know what you figured the balance to be." Figured the balance to be?

Where had there been in the correspondence up to May, 1888, any indication of any *balance* figured or not figured over $1,500?

But we have not yet a complete analysis of this most adroit composition of the Plaintiff's. He is not content with the statement in the first clause of his letter, which is contradicted by the record, but he reiterates his denial of any correspondence about this claim passing between himself and Plaintiff between May, 1888, and April, 1889. He says: "I have thought it quite strange that I had not heard from you." Note that that statement was written after, as Plaintiff "*thought*" (when before the Court below), he had specifically answered the very letter that he now so cunningly denies the existence of. If the assent absolutely essential, on the part of the Plaintiff, to any proposition made by Defendant, anywhere, or at any time in the history of this transaction, to purchase or sell for or to Plaintiff a one-half interest in this Burner lode claim, really exists in this remarkable epistle of April 6th, 1889; this collection of "cunningly devised fables," then such assent was certainly written with invisible ink, and only through the medium of a glass having the power of the famous "peep-stone" that the Angel Moroni gave to Joseph Smith, and with that glass in the hands of the Plaintiff, can such assent be deciphered?

But that there may not be the shadow of a doubt as to Plaintiff's deliberate purpose to ignore Defendant's candid and definite offer of June 5th, 1888, until from some source (possibly from his friend Pomeroy, who was, as the record shows, a mutual acquaintance of the parties in this suit), he found out that he might, even after a silence of ten months, be able to secure an interest in this claim

(*if he could only make the Plaintiff believe that he was under some legal obligations to deed him such interest*), he writes under date of May 20th, 1889, as follows: "On April 6th I sent you, by registered letter, $1,000, to apply on my one-half of the Burner lode claim, together with the $500 I advanced you some time ago. Please let me know if you received the draft all right, *and the amount due you still*, and I will remit you so you can mail me deed of same. Please let me hear as soon as possible so I may know that the draft arrived safely." (See exhibit 16, page 58 Transcript.) Still no reference whatever to the letter *at that very time in his possession*, and by which for the first time in this transaction (then of more than eighteen months duration) he was advised as to the exact amount he must pay to secure the disputed one-half interest in the Burner lode claim.

To all these artful dodgings, this Machiavellian duplicity, the Defendant finally, in a most business-like way, and with a candor refreshingly in contrast with the cunning of Plaintiff, replies under date of May 30, 1889, "I can't make you a deed to or in the Burner ground," (see exhibit 14, page 56 of Transcript) and he might very pertinently have added, "you have over reached yourself, Mr. Wenham, you are 'hoist with your own petard.'"

It is this very natural and reasonable treatment by the Defendant of the Plaintiff's inaction and deceit in regard to Defendant's letter of June 5th, 1888, that Appellant's Counsel says, "Every jurist in the country would decide was a ratification of the actions of the Defendant." We are fain to believe that from his list of "every jurist in the country" he must except this Court, as the Court below ventured to except itself.

SECONDLY, and very briefly: To the creation of a contract there must be contributed "a good and valid consideration." Upon this point the conduct of this case on the part of the Plaintiff has been most noticeable, for never in oral argugument and nowhere in brief of Appellant's Counsel is the word "consideration," as definitive of an essential factor in a contract to be found. In his brief no argument whatever is advanced in support of this third specification of error, to-wit: "The Court erred in deciding that the offer of defendant to to purchase for the Plaintiff a one-half interest in the Burner lode mining claim was a voluntary offer and not binding on Defendant," and it is much to the credit of Counsel's learning in elementary principles of law that he *omitted that specification entirely from his brief*, it not even being found under the head of "Errata," although such omission may indicate forgetfulness of rules of practice.

Appellant answers only with a silence of the Sphynx to the query, "Where, in this entire transaction, was there any suggestion even of any consideration whatever, as moving from Plaintiff to Defendant?"

Upon this point, however, most vital of all to the support of Plaintiff's contention, the Court below said: "This was a voluntary undertaking and it does not appear that Plaintiff was to pay anything or Defendant to ask anything for this service.

Where, then, we ask, is the contract pleaded in the bill? It has existence only in the *lucus a non lucendo* theory, and upon that theory the Court will judge it.

To argue the proposition that there can be a contract in contemplation of law without a consideration of some

kind, or that a court of equity will decree specific performance of an agreement when no consideration exists, would be to subject Appellee to the rebuke administered to Bro. Jones by Chief Justice Marshal: "Bro. Jones there are some things that a United States Court sitting in equity may be presumed to know," but we contend that the decision of the Court below must be affirmed upon the following propositions and the precedents supporting the same:

"An acceptance to be binding must be distinct, unconditional, and not vary the terms of the offer and be communicated to the other party without unreasonable delay."

Waterman on Specific Performance, 174, and cases cited.

"There must be mutuality as to obligation and remedy."

Id. 261 and cases cited.

"A contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail, if it be done, with due diligence after the receipt of the letter containing the proposal and before any intimation is received that the offer is withdrawn."

Id. 179 and cases cited.

"Contracts which are voluntary, or where there is no consideration on the part of him who seeks performance will not be specifically enforced though under seal."

Id. 247 and cases cited.

"The Court will refuse specific performance of a voluntary

or gratuitous contract or a covenant tha is not supported by a valid legal consideration."

Lawson Rights, Remedies and Practice, 5, 4270.
In re Webb, 49 California, 541.
Hickman vs. Grimes, 10 Amer. Dec., 714.
Buford's Heirs vs. McKee, 1 Dana, 107.
Black et al. vs. Cord, Harris & Gill, 2, 100.
Adams on Equity, 207.
Short vs. Price, 17 Tex., 397.
Express Co. vs. R, R. Co., 9 Otto, 191.

AARON H. NELSON,

Attorney for Appellee.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Oct TERM, 1892.

NO. 97

MARIA AMACKER, ET AL.,
Plaintiffs in Error.

vs.

NORTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

C. K. Wells Co., Printers, Helena, Mont.

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UNITED STATES OF AMERICA—ss.

The President of the United States of America; to the Judges of the Circuit Court of the United States, for the Ninth Circuit, District of Montana—GREETING:

Because in the record and proceedings, and also in the rendition of the Judgment of a plea which is in the said Circuit Court, before you, between Northern Pacific Railroad Company, Plaintiff, and Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants, a manifest error hath happened, to the great damage of the said Maria Amacker, and others defendants, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 21st day of January next, in the said U. S. Circuit Court of Appeals for the Ninth Circuit, to be there and then held, that the record and proceedings aforesaid be inspected; the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of December, in the year of our Lord one thousand eight [SEAL.] hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

GEORGE W. SPROULE, Clerk.

The above writ of error is hereby allowed.

HIRAM KNOWLES, Judge.

Endorsed: (Title of Court, Title of Cause.) Writ of error. Copy deposited in Clerk's office, U. S. Circuit Court, for defendants in error, this 22d day of December, 1892. Geo. W. Sproule, Clerk.

Filed December 22, 1892. Geo. W. Sproule, Clerk.

The answer of the Judges of the Circuit Court of the United States for the Ninth Judicial Circuit for the District of Montana.

The record and all proceedings of the plaintiff wherein mention is within made, with all things touching the same, we certify under the seal of our said Court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[SEAL.] GEORGE W. SPROULE, Clerk.

UNITED STATES OF AMERICA—ss.

To Northern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 21st day of January, A. D. 1893, pursuant to a writ of error filed in the office of the Clerk of the United States Circuit Court for the District of Montana, wherein Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Hiram Knowles, Judge of the District Court of the United States, this 22d day of December, [SEAL.] A. D. 1892, and of the Independence of the United States the one hundred and seventeenth.

HIRAM KNOWLES,
One of the Judges of the Circuit Court.

Due service of the above citation, and of the writ of error therein mention on this 22d day of December, 1892, is hereby admitted.

Dated December 22, 1892.

F. M. DUDLEY,
W. E. CULLEN,
Attorneys for Northern Pacific Railroad company, Defendant in error.

Endorsed: (Title of Court, Title of Cause.) Citation copy received this 22d day of December, 1892. F. M. Dudley and W. E.

Cullen, attorneys for plaintiffs. Filed December 22, 1892. Geo. W. Sproule, Clerk.

Pleas in the Circuit Court of the United States for the District of Montana, held at the United States Court room, in the city of Helena, in the District aforesaid, before the Honorable Hiram Knowles, United States District Judge for the District of Montana, presiding as one of the Judges of the Circuit Court of the United States for the Ninth Judicial Circuit, on Thursday, the 22d day of December, A. D. 1892, in the November Term of said Court, in the year of our Lord, one thousand, eight hundred and nine-two, and of the Independence of the United States the one hundred and seventeenth.

GEO. W. SPROULE, Clerk.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Be it remembered, that on the 8th day of May, A. D. 1891, came the plaintiff, by its attorneys, F. M. Dudley, Cullen, Sanders & Shelton, and filed in the office of the Clerk of the Circuit Court of the United States, for the District of Montana, at Helena, in said District, their Complaint in said above entitled cause, which said Complaint is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

COMPLAINT.

For cause of action against said defendants, plaintiff complains and alleges :

I. That it is a corporation, organized and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern route," and those acts and joint resolutions supplementary thereto and amendatory thereof.

II. That it is and was, at all the times hereinafter mentioned, the owner of and entitled to the possession of the south half of the northwest quarter of section seventeen (17), township ten (10), north of range three (3), west of the principal meridian of Montana.

III. That on the day of 1890, while the plaintiff was seized in fee simple of said land, the said defendants, without right or title, entered into the possession thereof, against the will and without the consent of the plaintiff, and ousted and ejected plaintiff therefrom, and now unlawfully withhold possession thereof from plaintiff.

IV. That said land is of the value of over ten thousand dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of possession of said land, and for its costs and disbursements herein.

CULLEN, SANDERS & SHELTON, and
F. M. DUDLEY,
Attorneys for Plaintiff.

State of Montana. } ss.
County of Lewis and Clarke. }

F. M. Dudley, being duly sworn, says: That he is an officer of the above named plaintiff, to-wit, its general land attorney; that he has read the foregoing complaint and knows the contents thereof, and that the same is true according to his best knowledge, information and belief. F. M. DUDLEY.

Subscribed and sworn to before me this 6th day of May, 1891.

[SEAL.] CHARLES H. COOPER,
Notary Public.

Endorsed: (Title of Court, Title of Cause.) Complaint filed May 8, 1891. Geo. W. Sproule, Clerk.

And thereafter, on the 8th day of May, 1891, there issued out of said Clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the Marshal thereto attached, are in the words and figures, following, to-wit:

United States of America.

Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena and County of Lewis and Clarke.

The President of the United States of America—Greeting:

To Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

You are hereby required to appear in an action brought against you by the above named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, and to file your plea, answer, or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Helena, and County of Lewis and Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover from you said defendants the possession of that certain piece, parcel or tract of land described as follows: The south half of the northwest quarter of section seventeen (17), township ten (10), north of range three (3) west of the principal meridian of Montana; which you said defendants on the day of 1890, while plaintiff was seized in fee simple, ousted and ejected plaintiff therefrom, and now unlawfully withhold possession thereof from plaintiff, and for costs and disbursements herein; all of which is more fully set out in the original complaint on file herein, to which reference is hereby made, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint herein.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of [SEAL.] May, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the 115th.

GEO. W. SPROULE, Clerk.

United States Marshal's Office, }
District of Montana. }

I HEREBY CERTIFY, That I received the within writ on the 8th day of May, 1891, and personally served the same on the dates named day of May, 1891, by delivering to and leaving with Maria Amacker and John J. Amacker (16th), Frank H. Pings (26th), A. J. Steele, H. B. Reed, W. H. Little, Geo. S. Howell, Geo. Dibert, J. Jordan, Geo. Gotthardt, John Blank (12th), said defendants named therein, personally, at the County of Lewis and Clarke, in said District, a certified copy thereof, together with a copy of the complaint certified to by Clerk of said Circuit Court attached thereto.

WM. F. FURAY, U. S. Marshal.

By GEORGE LEEKLEY, Deputy.

Helena, May 27, 1891.

Endorsed: No. 140 U. S. Circuit Court, Ninth Circuit, District of Montana, Northern Pacific Railroad Company vs. Maria Amacker et al. Summons. Cullen, Sanders & Shelton and F. M. Dudley, plaintiff's attorneys. Filed June 6th, 1891. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 20th day of June, 1891, came the defendants, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, by their attorney, Thomas C. Bach, and filed their answer to said complaint, which said answer is in the words and figures, following to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff.

vs.

Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

The defendants, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, who appear by Thos. C. Bach, their attorney, for answer to the complaint herein:

1st. Deny that the plaintiff is or ever was the owner of or entitled to the possession of the south half of the northwest quarter of section 17, township 10, north of range 3 west of the principal meridian of Montana, or any part thereof.

2d. Denies that defendants, or any of them, ever or at all ousted or ejected plaintiff from said premises or any thereof, or that they or any of them unlawfully withheld the possession thereof, or any thereof from such plaintiff.

Wherefore defendants pray judgment against the plaintiff that the complaint of plaintiff be dismissed, and that they recover their costs in this case expended.

THOS. C. BACH,
Attorney for Defendants named.

State of Montana, }
County of Lewis and Clarke. } ss.

Walter H. Little, being duly sworn, says that he is one of the defendants answering herein, and that he and they are united in their interests and pleading in this case, and that he is acquainted with the facts of this case; that he has read the foregoing pleading, and knows the contents thereof, and that the facts therein stated are true to his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

WALTER H. LITTLE.

Subscribed and sworn to before me this 20th day of June, 1891.

THOS. C. BACH,
Notary Public in and for Lewis and Clarke County, State of Montana.

I do hereby certify that in my opinion the foregoing answer is well founded in law.

THOS. C. BACH,
Attorney for Defendants.

Service of the above answer this 20th day of June, 1891, is admitted.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiff.

Endorsed: (Title of Court, Title of Cause.) Answer. Thos. C. Bach, attorney for defendants named in answer. Filed June 20, 1891. Geo. W. Sproule, Clerk, by W. J. Kennedy, Deputy Clerk.

And thereafter, to-wit, on the 18th day of March, 1892, came

the defendants, Maria Amacker and John J. Amacker, by their attorney, Massena Bullard, and filed their separate answer to said complaint; which said separate answer is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank G. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

Separate Answer of Maria Amacker and John J. Amacker.

And now come Maria Amacker and John J. Amacker, two of the defendants above named, and for their separate answer to the complaint of the plaintiff,

First. Deny that the said plaintiff is, or was at all the times or any of the times, or ever, the owner of or entitled to the possession of the south half of the northwest quarter of section number seventeen (17), in township ten (10), north of range number three (3), west of the principal meridian of Montana; or that plaintiff is, or ever was, the owner of or entitled to the possession of any part or portion of said premises.

Second. Deny that the plaintiff was at the time mentioned in said complaint seized in fee simple of said land, or had any interest therein, and deny that these defendants or either of them, without right or title entered into the possession thereof, and deny that these defendants or either of them ousted or ejected the plaintiff from said premises, or any part thereof, and deny that these defendants or either of them now unlawfully withhold possession of said premises from the plaintiff.

Wherefore, having fully answered said complaint, these defendants pray to be discharged with their costs in this behalf expended.

MASSENA BULLARD,
Attorney for answering defendants.

State of Montana, } ss.
County of Lewis and Clarke. }

Maria Amacker, being duly sworn, says: That she is one of

the answering defendants named in the foregoing answer, and acquainted with the facts therein stated; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge except as to those matters which are therein stated upon her information and belief, and as to those matters she believes the same to be true.

MARIA AMACKER.

Subscribed and sworn to before me this fifteenth day of March, in the year of our Lord 1892.

[SEAL.] J. MILLER SMITH,
Notary Public.

Endorsed: No. 140. Northern Pacific R. R. Co. vs. Maria Amacker, et al. Separate answer of Maria Amacker and John J. Amacker. Due and legal service of the within answer accepted this sixteenth day of March, A. D. 1892. Cullen, Sanders & Shelton, Attys. for Plaintiff. Filed March 18th, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 7th day of April, 1892, the following proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Ordered that this cause be, and the same hereby is, set for trial May 11, 1892, at 10 a. m.

And thereafter, on the 23d day of May, 1892, a stipulation was filed herein waiving a jury in said cause, which stipulation as filed is in words and figures following, to-wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

Northern Pacific Railroad Company,
Plaintiff,
vs.
Maria Amacker et al.,
Defendants.

It is hereby stipulated and agreed between all parties hereto before and at the commencement of the trial of the above cause that

a jury is waived and that said cause be tried to the Court without a jury.

Dated May 23, 1892.

CULLEN, SANDERS & SHELTON, and
F. M. DUDLEY,
Attorneys for Plaintiff.

THOS. C. BACH,
Attorney for Defendants.

MASSENA BULLARD,
Attorney for John J. Amacker and Maria Amacker, Defendants.

Endorsed: No. 140. Northern Pacific Railroad Company vs. George S. Howell et al. Stipulation. Filed May 23, 1892. George W. Sproule, Clerk.

And thereafter, to-wit: on the 23d day of May, 1892, the following further proceeedings were had and entered of record herein in the words and figures following, to-wit:

(Title of Court.)

Northern Pacific Railroad Company vs. George S. Howell, et al.

This cause coming on for trial this day before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the respective counsel herein; Messrs. F. M. Dudley, Cullen, Sanders & Shelton appeared for plaintiff, and Messrs. Thomas C. Bach and Massena Bullard appeared for the defendants; George M. Bourquin and W. M. Scott sworn as witnesses for plaintiff and certain documentary evidence introduced, and thereupon W. H. Little and Maria Amacker sworn as witnesses for defendants and certain documentary evidence introduced, and thereupon evidence being closed, after argument of counsel, cause submitted to the Court for consideration and decision.

And thereafter, to-wit: on the 14th day of November, 1892, the following further proceedings were had and entered of record herein, in the words and figures following, to-wit:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker, et al.

This cause, heretofore tried and submitted to the court for decision, came on this day for the judgment of the court, and thereupon after due consideration, it is ordered that judgment be entered in this cause in favor of plaintiff and against defendants for the possession of the lands described in the complaint and for its cost of suit.

And on said 14th day of November, 1892, the court filed its opinion in said cause, which said opinion so filed is in the words and figures following, to-wit:

In the United States Circuit Court, District of Montana.

The Northern Pacific Railroad Company,
Plaintiff,
vs.
Maria Amacker et al.,
Defendants.

Action at law. Ejectment. Opinion filed Nov. 14, 1892. F. M. Dudley, W. E. Cullen, for plaintiff; Thos. C. Bach, Massena Bullard, for defendants.

This is an action in the nature of ejectment, brought by plaintiff to recover from defendants the possession of the south half of the northwest quarter of section seventeen, in township ten (10) north, range three, west of the principal meridian of Montana. Plaintiff alleges that it is the owner in fee simple of said land; that defendants have ousted and ejected it therefrom, and withhold the possession thereof from it.

Defendants in their answer deny the allegation of ownership of said lands set forth in the complaint and those concerning the ouster of plaintiff, but admit that they are in possession of the same and are holding the same against plaintiff. The evidence in this case fully establishes as a fact that plaintiff received from the United States, in 1864, a grant of all odd sections of public, and not mineral, to the amount of twenty odd sections per mile on each side of said plaintiff's railroad line which it should establish through the territory of Montana, and whenever the United States should have full title to the same, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; that plaintiff accepted the grant, and constructed the road named in the act making the same; that the land in dispute is an odd section within forty miles of the definite line of said road fixed as required by said act.

In October, 1868, one William M. Scott, it appears, filed in the United States Land Office at Helena, Montana, his declaratory statement to the effect that it was his intention to claim the said tract of land as a pre-emption right, under the provisions of the act of Congress of September, 1841. In 1869, he built a cabin on the same, and lived there until the fall of that year, when he left the same

and moved to the city or town of Helena, where he lived until in 1878, when he removed to Butte, Montana. He never returned to said land after leaving the same, and never subsequently exercised any acts of ownership over the same. Helena is but a short distance from where this land is situate, less than three miles.

On May 3, 1872, Wm. McLean, filed an application in the United States Land Office at Helena, Montana, to enter the same as a part of his homestead claim. It does not appear as to whether or not he ever resided upon said land or ever made any improvements upon the same. On December 1, 1864, the Commissioner of the General Land Office wrote to the Register and Receiver of the United States Land Office at Helena, Montana, informing them that this homestead entry of McLean's, with others, was held for cancellation, on the ground that the same was made subsequent to the time at which the right of the Northern Pacific Railroad Company attached to the same, as a part of an odd section within their grant, and directing them to serve notice upon McLean to show cause why it should not be cancelled. It appears that the general route of the Northern Pacific Railroad opposite to the land in dispute was located about February 1, 1872. Whether any notice was served, or anything further done at that time, does not appear.

On the 3d day of July, 1879, the Register and Receiver of the said Helena Land Office, the same being J. H. Moe and F. P. Sterling, respectively, wrote to the Commissioner of the General Land Office the following letter:

"We have the honor to report that June 2d, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days from date of said notice why their entries should not be cancelled, and up to this date no action has been taken * * * * No. 819, William McLean, W. ½ N. W. ¼, S. E. ¼ N. W. ¼ and S. W. ¼ N. E. ¼ of sec. 17, 10 N., 3 W., made May 3d, 1872. We would respectfully recommend that these homestead entries be cancelled."

On Sept. 11th, 1879, the acting commissioner of the general land office wrote to the register and receiver of the Helena Land office the following official letter:

"I am in receipt of your letters of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of December 20th, 1873, to show cause why their entries should not be cancelled, and that no action had been taken by them, and recommending for cancellation the said entries, viz: * * * * No. 819, made May 3d, 1872, by William McLean, W. ½ N. W. ¼, S. E. ¼ N. W. ¼ and S. W. ¼ N. E. ¼, sec. 17, 10, N. R. 3 W. * * In view of

the fact that the above entries were held for cancellation in Nov. and Dec., 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled." The inference from these letters is that, as a fact, there had been no cancellation of McLean's entry until this letter of September 11th.

On July 2, 1882, the definite route of plaintiff's road was fixed opposite to where this land was located, and a plat thereof filed with the Commissioner of the General land office.

In August, 1882, William McLean died. On or about the 15th day of March, 1883, Maria McLean, as the widow of William McLean, made her application to enter said land, stating in the same that she applies to perfect the said homestead entry made by her husband on the 3d day of May, 1872, and that her claim thereto is based upon the second section of the act of Congress approved June 15, 1880, and section 2291, of the revised statutes of the United States. Plaintiff contested this application. On the 20th day of February, 1885, the Commissioner of the General Land Office sustained the application of the said Maria McLean. Plaintiff appealed from this decision to the Secretary of the Interior. On March 28, 1887, H. L. Muldrow, as acting Secretary of said department, affirmed the decision of the Commissioner of the General Land Office, and the application of Maria McLean was again sustained, and a patent to said land awarded her.

The provisions of the United States considered in deciding this question are as follows:

Act of April 21, 1876. "That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

"Section 2. That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterwards were abandoned, and under the decisions and rulings of the Land Department were re-entered by pre-emption or homestead claimants who

have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto."

See Supplement to the Revised Statutes of the United States, page 99.

Sec. 3 of said act refers to entries made subsequent to the expiration of a land grant, and has no reference to any such question as is presented in this case.

The notice of the withdrawal of the lands at the time of the fixing of the general route of plaintiff's road, from sale, entry or pre-emption, by the Commissioner of the General Land Office, was filed in the local land office at Helena, Montana, on May 6, 1872.

Sec. 2 of act of 1880 is as follows:

"That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

21 U. S. Stat., 233.

Under the issues presented in this case the burden of proof was cast upon plaintiff, and it must rely on the strength of its own title. The grant to the Northern Pacific Railroad Company was one *in praesenti*, and conveyed to it the legal title to all odd sections of public land not mineral on each side of the line of its road, as definitely fixed, to the extent of twenty sections in Montana, it then being a territory, or in all forty sections per mile, whenever the United States should have full title thereto, and they were not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claim or right at the time the route of its road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. Until the road was thus definitely fixed the grant was in the nature of a float, then it received precision and became attached to certain and specific land, as of the date of the grant.

St. Paul and Pacific R. R. Co. vs. Northern Pac. R. R. Co., 139 U. S., 1.

Desert Salt Company vs. Tarpey, 142 U. S., 241.

Wisconsin R. R. Co. vs. Price County, 133 U. S., 496.

If at the time of the fixing of the definite route of plaintiff's road it transpired that any portion of the odd sections on each side of its road as above described was in such a condition that the United States did not have full title to the same, or the government had reserved, sold, granted or otherwise appropriated them, or they were not free from pre-emption or other claims or rights, they did not pass to plaintiff in its grant, and it was entitled to others, as provided by law, in lieu thereof.

The ruling of the Commissioner of the General Land Office, or the Secretary of the Interior, did not determine any right of plaintiff to the land in dispute. The ruling of the Land Department does not determine the right to or ownership of land when the government has parted with the same, but only as to whether the government should issue or not a patent to the land claimed by the applicant.

Nor. Pac. R. R. Co. vs. F. E. Wright. Fed. Rep.

The Court is therefore called upon to determine the question as to whether the land did or did not pass to plaintiff in its grant.

It is claimed that by virtue of section six of the said act making the grant to plaintiff the odd sections of public land, which include the land in dispute, on each side of the general route of plaintiff's road to the extent of twenty, were withdrawn at the date of the fixing of such general route from entry, sale and pre-emption. The general route of plaintiff's road, as we have seen, was fixed on February 21, 1872. Admitting this to be true, and it becomes necessary to inquire what was the status of this land at that time. Scott had filed his application to pre-empt the same, but he left it in 1869, and never returned thereto, or afterward made any claim thereto. In order that a party should have the benefit of the pre-emption laws it must appear that his residence on the land claimed was both continuous and personal.

Bohall vs. Della, 114 U. S., 47.

The pre-emption laws give a right of purchase of land from the United States, and a preference to persons who have complied with their terms over other claimants.

Frishe vs. Whitney, 9 Wall., 187.
The Yosemite Case, 15 Wall., 77.

It is not a vested interest in land. This right may be abandoned. Whenever a person leaves property of which he is pos-

sessed, without any intention of reclaiming the same again, he abandons it.

Richards vs. McNulty, 24 Cal., 339.
Judson vs. Mallory, 40 C., 299.

A right may be abandoned as well as property.

Am. and Eng. Encyclopædia of Law. Vol. 1, title Abandonment.

The leaving of said land by Scott, the failure in any way to comply with the pre-emption laws after leaving the same, his removing to the town of Helena, but a short distance from the land, and remaining there following his vocation as a plasterer for nine years, and then his removing to Butte City, Montana, and making that his residence up to the date of trial, must be considered as an abandonment by Scott of all right he had under the pre-emption laws to a preference in purchasing said land he had acquired by his filing his application to purchase the same, and his residence thereon. What Scott's intention was may be shown by circumstances. The circumstances, I think, show that his intention was to relinquish whatever rights he had to pre-empt this land. When did this intention take place? At the time he left the land, must be the answer. He left the land, and his subsequent conduct shows he had no intention of returning to it. There is no fact which would have any tendency to show that this intention took possession of him at any other time than when he left it. If the land was withdrawn from market by virtue of said section six, the law withdrew the same, and not the order of the Secretary of the Interior. There are several decisions of the Federal Courts that hold, in view of the above interpretation of the said section six, that the application of McLean to enter as a homestead said land at the time he did was a nullity. About the time, however, of the location of the general route of plaintiff's road there were rendered several decisions of the Land Department to the effect that the land was not withdrawn from market until the filing of a map of such route in the local land offices in the States and Territories through which such route lay. Then it was that the local offices had notice of the fixing of the general route. Under this ruling the filing of the application of McLean was in time. With a view of relieving men who had filed under this ruling, the act of April 21st, 1876, was passed, and, according to my view, corrected any error in that respect.

There was another view under which that law would have cured any defect in McLean's filing. By virtue of certain other rulings of the Land Department it was held, if there existed a pre-emption application on file at the time of the filing of the map of the general route with the Commissioner of the Land Office, or Secretary of the Interior, the land did not pass to the plaintiff, but was

excluded from its grant. I believe the reasoning which resulted in this ruling was based upon the view that the provisions of the act which excludes certain lands from the grant of plaintiffs which were in a certain condition at the time of the definite fixing of plaintiff's road, applied to the fixing of the general route of its road. If Scott's claim was a subsisting one at the time of the fixing of the general route of plaintiff's, under this ruling it did not pass to plaintiff. In view of this ruling, the 2d section of the said act of 1876 was passed. With this view of the law the ruling of acting Secretary of the Interior in considering the application of Mrs. McLean, now Maria Amacker was correct, if she could be subrogated to the rights of her husband McLean under the law of June 15th, 1880, for the land, not passing to plaintiff, was subject to entry. The Secretary was not confronted with the fact of the abandonment of Scott before this general route was fixed. The intention of Congress was to validate all pre-emption and homestead entries made under these rulings of the Land Department, whether erroneous or not, where the applicants complied with the pre-emption and homestead laws. If section six bears the construction which the Land Department has given the same, as well as some courts, it should be considered as modified by this act of 1876.

Under the view which this court has held of the provisions of said section six of the grant to plaintiff, McLean's application was valid.

In the case of Northern Pacific R. R. Co. vs. Sanders et al., 46 Fed. Rep., 239, and Id.. 47 Fed. Rep., 604, this court held that the effect of section six of said act was not to withdraw any lands from sale, entry or pre-emption at the time of the filing of the plat of the general route of plaintiff's road. The language is that the lands hereby granted, that is by the act in which said section is found, shall be reserved from sale, entry and pre-emption.

In the case of Barney et al. vs. Winona and St. Peter R. R. Co., 117 U. S., 228, the Supreme Court, in considering a similar grant, defined the term "granted lands," and said, "they are those falling within limits specially designated, and *the title to which attached* when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department as of the date of the act of Congress."

In several cases the Supreme Court has held that the title attaches only when the route of the road is definitely fixed.

St. Paul and Pacific R. R. Co. vs. Nor. Pac. R. R. Co., supra.

Desert Salt Co. vs. Tarpey, supra.

Wisconsin R. R. Co. vs. Price County, supra.

The granted lands had not then been designated and made known at the time of the location of the general route of plaintiff's road, and not until the location of the definite route thereof. I do not see then, how they could be reserved from sale, entry and pre-emption, until the definite route of said road was fixed and they became known. The view that unknown and undescribed lands can be withdrawn from sale, entry or pre-emption, does not seem to me possible. I know it is sometimes claimed that the general route should be substantially the same as the fixed route. There is nothing in the law which requires this, and as a matter of fact this is not at all places the same, even substantially.

There is one matter for consideration in considering when the local land office had notice of the withdrawal of the lands along the general route of plaintiff's road. If they were withdrawn by law, then there was notice of this law, when approved by the President.

But I do not think that the above act of 1876 had this in mind. It was endeavoring to make valid entries made under rulings of the Land Department, and the notice referred to was the one given by the General Land Office to the local offices.

In any view, except under the provisions of section 2, of the act of 1876, the filing of McLean was a valid one, and it was not valid under that section on account of the abandonment of Scott of his rights before the filing of the plat of the general route of plaintiff's road. McLean could have legally perfected his title, according to my view. He did not do this. There is nothing to show that he resided on the same, or in any way complied with the pre-emption laws. In accordance with the rules of the Land Department, notice was served on him that he should within thirty days show cause why his entry should not be cancelled. He failed to show cause, and on the 11th day of September, as before stated, his entry was cancelled, because he had not complied with the law in making proper proofs.

It was urged by defendants in the argument of this cause, that it did not appear that proper notice was given to McLean. The Register and Receiver in their letter of July 3d, 1879, recite that McLean had among others received due notice in accordance with the circular of the Commissioner of the General Land Office to show cause why his entry should not be held for cancellation. In the letter of Sept. 11th, 1879, the Commissioner of the General Land Office recites that due notice was given McLean. My attention was not called to any law providing for preserving these notices, or the manner of the service thereof. I think under these circumstances this comes within the rule expressed by the Supreme Court, in the case of Cofield vs. McClelland, 16 Wall., 331. In that case the court was considered a statute of the territory of Colorado that

required a probate judge should give a certain notice of the entry of a townsite, under the act of Congress. There was a failure of proof as to this notice, and in regard to the matter the court said: "We think this is a case in which the presumption applies that the officer has done his duty, especially as no provision was made in the act for procuring evidence that notice had been published. The case comes within the rule so well settled in this court that the legal presumption is that the surveyor, register, governor and secretary of state have done their duty in regard to the several acts to be done by them in granting lands, and therefore surveys and patents are always received as *prima facie* evidence of correctness."

What was the effect of the cancellation of McLean's entry? In the case of Gallagher vs. Cadwell, 145 U. S. 368, the Supreme Court said of the cancellation of a homestead entry under circumstances almost identical with the one at bar :

"At that time, and by that act all her rights of every kind and nature were ended and the land was fully restored to the public domain free for occupation and purchase by any other citizen as though there never had been any semblance of occupation or entry."

Taking this rule and applying it to this case we find that the land in dispute was, on the 15th day of June, 1880, when the act above recited was passed, as free for occupation and purchase as though there had never been the entry of McLean attached thereto. What was the effect of that act? It did not grant to McLean any interest in the land in dispute. It did not amount to a sale or an entry of the land. He had the privilege to enter the land until the rights of others attached thereto. He certainly could not wait indefinitely before exercising this privilege or right. He did nothing toward exercising this right for over two years, and died without making any move to exercise this privilege after the same was given him by that act. This privilege was not a claim upon the land. In the case of the Northern Pacific R. R. Co. vs. Sanders et al., supra, this court took occasion to consider to a limited extent the term claim as used in the grant to plaintiff, and then said: "I would not say that every assertion of title to land would be entitled to the term claim. Perhaps acts sufficient should accompany the assertion of title to entitle the claimant to a standing in a court of justice to contest the right to the possession of the premises."

The mere privilege to enter land unaccompanied by any acts, if treated as a claim would incumber all the public domain subject to entry and pre-emption to a claim, for every citizen has the privilege of entering or pre-empting the same. By virtue of the act itself under which defendants claim this privilege of entry or purchase of the land concerning which this privilege or right was given was subject to entry as a homestead by any qualified citizen at any time

before this right was exercised. Certainly then the intention of Congress was not to incumber this land with a claim in favor of McLean. It is urged however that the provision of the statute making the grant to plaintiff is that the land which passes to it must be free from any right as well as any claim, at the time of the definite fixing of its road. The term right as here used does not appear to me to be very definite, and its legal meaning not altogether certain. It will be observed that the land must be free from this right. There is a difference between a right which is given an individual, and a right attached to land. Bouvier in his Law Dictionary defines right to be "a well founded claim."

In the case of Newkirk vs. Newkirk, 2 Caines R. 345, the court said: "Right is equivalent to all right." Right and estate are synonymous, at least in wills with each other.

In Rapalje & Lawrence Law Dictionary, in defining 'right' said of it: "Right to bring an action for possession of land given the owner." In some states the action to recover the possession of land is termed the action of right. In such an action the plaintiff claims some estate in the land which is the subject of the action which entitled him to the possession thereof. I feel confident that the right mentioned in plaintiff's grant was some estate in land and not a privilege which pertained to the individual, and I cannot think that the said act of 1880 gave to McLean any right in the land. If so, it was in some way a grant to some estate in the land. Such, I am sure, was not the intention of Congress in passing that act. If an estate in the land, would it pass to his heirs or administrator? How would it be subject to distribution? The suggestion of such questions show that certainly no estate of any kind was granted to McLean in the land.

There is one other point presented in considering that statute. It is very doubtful as to whether any right or privilege was given to Mrs. McLean thereunder. The widow is not named therein as a beneficiary. In the case of Calliher vs. Cadwell, supra, when considering this statute, the Supreme Court said:

"And the argument is worthy of consideration that because in some acts of Congress she is specially named as entitled to rights originally vested in her husband, and the omission to specify her in the act in question was an intentional exclusion of her from the privileges named, and that Congress did not intend to grant to others than the homesteader and the persons holding under him by instrument in writing any rights by reason of his incompleted homestead entry."

In support of this view the Court cites Sutherland on Statutory Construction, Sec. 327, and cases cited. In looking at that section we find this language:

"Where a statute enumerates the persons or things to be affected by its provisions there is an implied exclusion of others; there is a natural inference that its application is not intended to be general."

While the Court in that case rested its decision upon the ground of laches, still all the way through the same it treats the fact that the widow was not named in the statute of 1880 as an important one in the consideration of the case. I do not see how the provision of the Revised Statutes of the United States can be considered a supplement to that of 1880 above named. That statute applies to another directly. The said statute of 1880 does not purport in any way to supplant or take the place of any part of said section. It is an independent statute by itself. While in pari materia with the other statutes for the disposal by general laws of the public domain, and to be construed with them, there is nothing which will warrant a court in taking a clause of one statute which applies to a particular subject and condition, and make it apply to a totally distinct statute.

But allowing that part of said section which gives the privilege to a widow to complete the homestead entry of her husband applies, and can it be said that it conveys any estate to her in the land, any interest in it whatever? We have *seen* the land became public domain free to any citizen to occupy and pre-empt, or enter the same upon the cancellation of McLean's entry. Considering then all of these statutes, and it does not appear to me that the land in dispute was such as the United States had full title to not reserved, sold, granted or otherwise appropriated and free from any pre-emption or other claim or right, at the time when the definite route of plaintiff's road was fixed and a map thereof filed in the office of the Commissioner of the General Land Office. By the terms of the grant, it then passed to plaintiff, neither McLean or his widow had then exercised the privilege granted them, if any was granted to the latter, by the act of 1880. The rights granted to McLean by the act of 1876 above referred to was lost by his failure to comply with the statute that required his final proofs to be made within a certain time, and the cancellation of his entry in 1879.

Considering, as I have steadily maintained we should, the condition of the land at the time the definite line of plaintiff's road was fixed, and the grant to it received precision, I cannot see how I can reach any other conclusion then, than that plaintiff is the owner of the land in dispute.

I therefore find that the plaintiff is the owner of the land described in the complaint herein, and entitled to the possession thereof.

That defendants are in possession of the same without its consent, and wrongfully.

It is therefore ordered that judgment be entered in this case in favor of plaintiff, and against defendants for the possession of the land described in the complaint, and for its costs of suit.

And thereafter, to-wit, on the 14th day of November, 1892, the following further proceedings were had and entered of record herein, in the words and figures following :

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

On motion of counsel for defendants and by consent of counsel for plaintiff, defendants are hereby granted a stay of execution pending the preparation and filing of bond on writ of error; and it is further ordered that defendants have thirty days in which to prepare and file a bill of exceptions herein, and that said defendants have until said bill of exceptions is filed herein to file findings, and that the bond herein be fixed during this term of court.

And thereafter, to-wit, on the 6th day of December, 1892, defendants filed their bill of exceptions herein, which said bill of exceptions as filed, is in the words and figures following, to-wit :

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff.
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

Bill of Exceptions.

Be it remembered, that this cause coming on for trial on the 23d day of May, 1892, one of the days of the April term of the above Court, and before the trial a stipulation in writing, signed by the attorneys for the parties both plaintiff and defendants having been filed in open Court, whereupon said cause was called for trial before the Court sitting without a jury, a trial by jury having been expressly waived by the stipulation aforesaid, and the pleadings having been read to the Court, the plaintiff, to maintain the issues on its part, introduced the following testimony :

The plaintiff offered evidence showing acceptance by the plaintiff of the grant of lands to it made by the United States of America by an act of Congress entitled "An act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved July 2nd, 1864.

The plaintiff's testimony further tended to show that the land in controversy herein is agricultural in character.

The plaintiff next offered in evidence a certified copy of the map of the General Route of plaintiff's road for the purpose of showing that the lands in controversy were within forty miles of the line of said route.

The plaintiff then offered in evidence a certified copy of the order of withdrawal made after the filing of the map of general route by the Commissioner of the General Land Office and the date of filing said order of withdrawal in the local land office of the United States at Helena, Montana—the land in controversy being within the district of lands subject to sale at said local land office, which order, the date thereof and the date of its receipt at the local office being as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, April 22, 1872.

Register and Receiver, Helena, Montana:

GENTLEMEN—I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under the act of July 2nd, 1864, and by direction of the Secretary of the Interior you are hereby directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed *odd* numbered sections of public lands falling within the limits of forty miles as designated on this map.

You will also increase in price to $2.50 per acre the even numbered sections within these limits, and dispose of them at that ratability, and under the pre-emption laws only. No private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

The plaintiff then offered evidence tending to show that the map of definite route mentioned in said act was filed in the office of

the Commissioner of the General Land Office at Washington, D. C., on July 6, 1882, and in said local land office at Helena, Montana, on June, 21, 1883, and that the land in controversy was within the forty mile limit as shown by each of said maps, and within two miles of the line of said road, and is situated within the district of lands belonging to the United States of America, and subject to sale at the said local land office at Helena, Montana.

The plaintiff then offered evidence to show the acceptance of its road by the Commissioners appointed for that purpose under the act of Congress aforesaid.

George M. Borquin, being duly sworn as a witness for the plaintiff, upon his direct examination testified that he is the Receiver of the United States Land Office at Helena, Montana. The testimony of said witness tended to show that an official book called the tract book kept in said office would show the entries filed of record in said land office upon any tract of land within the district of lands subject to sale at said office.

Counsel for plaintiff then offered in evidence a certified copy of the tract book showing entries as follows—being all the entries of the premises in dispute, to-wit:

"Section 17. S. ½ N. W. ¼ and N. ½ S. W. ¼. Oct. 5, 1868, Wm. M. Scott, D. S. No. 179," being the entry based upon the declaratory statement hereinafter referred to.

"S. ½ N. W. ¼ and N. E. ¼ N. W. ¼. Oct., 1868. Oct. 20, 1869, Wm. M. Scott, D. S. No. 719. See Sec. 8 (amendatory of D. S. No. 179)."

~~"H. E. W. ½ N. W. ¼ and S. E. ¼ N. W. ¼ and S. W. ¼ N. E. ¼."~~

(Cancelled as per Commissioner's letter "F" of Sept. 11, 1879.)

Sec. 17, Township No. 10, N. Range No. 3 West, 160 acres, $1.25 per acre, purchase money $16.00. Wm. H. McLean, May 3, 1872. No. of receipt and certificate of purchase, 819."

Counsel for defendants objected to so much of the paper offered in evidence as reads, "Cancelled as per Commissioner's letter 'F' of Sept. 11, 1879," for the reasons:

1st. That the letter itself would be the best evidence.

2d. Because it does not appear that McLean received any notice to appear and protect his right before the department.

Which objection was by the Court then and there overruled, and said paper was admitted in evidence.

To which ruling of the Court in allowing so much of the entry as reads "Cancelled, as per Commissioner's letter "F" of Sept. 11th,

1879" in evidence, Counsel for the defendants then and there excepted.

Plaintiff then offered in evidence a certified copy of a letter dated July 3d, 1879, signed by the Register and Receiver of the United States Land Office at Helena, Montana, and addressed to the Honorable Commissioner General Land Office, Washington, D. C., for the purpose of showing that McLean had been duly notified to appear and show cause why his entry should not be cancelled, the defendant Maria Amacker having been required to produce the notice mentioned in said letter, and having failed to find any such paper among the papers of her late husband, William McLean, which said letter is as follows, to-wit :

UNITED STATES LAND OFFICE,
HELENA, MONTANA, July 3, 1879.

Hon. Com. Gen'l Land Office, Washington, D. C.

SIR :—We have the honor to report that June 2d, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days, from date of said notice, why their entries should not be cancelled, and up to this date no action has been taken.

* * * * * * *

No. 819, William McLean, W. ½ N. W. ¼, S. E. ¼ N. W. ¼, and S. W. ¼ N. E. ¼, Sec. 17, 10 N., 3 W., made May 3, 1872.

* * * * * * *

We would respectfully recommend that these homestead entries be cancelled. Very respectfully,

J. H. MOE, Register.
F. P. STERLING, Receiver.

To which evidence and offer counsel for the defendants objected, for the reason that it does not appear what notification was given to McLean, and that the letter simply states as a conclusion of law that Mr. McLean was duly notified—what notice was given not being stated.

The objection was by the Court overruled, and the said letter admitted in evidence, to which ruling of the Court, admitting the said letter in evidence, counsel for the defendants then and there excepted.

Counsel for plaintiff then offered in evidence a letter signed by the Commissioner of the General Land Office, at Washington, D. C., and addressed to the Register and Receiver of the United

States Land Office at Helena, Montana, dated September 11, 1879, cancelling the homestead entry of William H. McLean, which letter is as follows, to-wit:

F. O. 24,576.
O. 31,284. Sept. 11, 1879,

Register and Receiver, Helena, Montana T.:

GENTLEMEN—I am in receipt of your letters of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz:

* * * * * * *

No. 819, made May 3, 1872, by William McLean, W. ½ N. W. ¼, S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼ 17, 30 N., 3 W.

* * * * * * *

In view of the fact that the above entries were held for cancellation in Nov. and Dec., 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled.

* * * * * * *

Advise the parties in interest.

Very respectfully,

J. M. ARMSTRONG,
Acting Commissioner.

To which offer and evidence, counsel for the defendants objected, for the reason that it is incompetent and immaterial, and for the further reason that it does not appear that McLean was ever notified of the action of the department, or to appear and show cause why his entry should not be cancelled.

The objection was by the Court overruled, and the said letter admitted in evidence.

To which ruling of the Court, admitting said letter in evidence, Counsel for the defendants then and there excepted.

William M. Scott was then called as a witness on behalf of the plaintiff, and having been duly sworn, testified upon his direct examination that he now resides in Butte City, Montana.

And upon the examination of the said witness, Counsel for plaintiff asked the following questions:

Q. Will you examine this paper (handing to witness a certified copy of a Pre-emption Declaratory Statement, dated October 5, 1868, made by him in the United States Land Office at Helena, Montana, for the S. ½ N. W. ¼ and N. ½ S. W. ¼, Section 17, Tp. 10 N., R. 3 W., being the filing, the record of which appears in the Tract Book hereinbefore mentioned)? I will ask you if you are the Mr. Scott mentioned in this paper?

A. Yes sir.

Q. You settled on this land Oct. 5th, 1868, the S. ½ N. W. ¼ and N. ½ of S. W. ¼ Sec. 17.

A. I did. I built a house on it in the spring of 1869 and moved on to it.

Q. When did you leave it, if at all.

To which question counsel for the defendants objected as being immaterial and incompetent, for the reason that the filing appears of record and valid on its face, no abandonment having been filed.

The objection was by the Court overruled, to which ruling counsel for the defendants then and there excepted.

The answer of the witness was as follows:

A. I left it in the fall of 1869.

Q. Did you afterwards return to the land?

To which question counsel for defendants objected as being incompetent and immaterial because the filing appears of record, uncancelled, and valid on its face, no abandonment ever having been filed.

The objection was by the Court overruled, to which ruling counsel for defendants then and there excepted.

The answer of the witness was as follows:

A. No Sir.

Plaintiff then offered in evidence the declaratory statement referred to, certified by the Receiver of the Land Office to be correct, which declaratory statement is as follows:

DECLARATORY STATEMENT FOR CASES WHERE THE LAND IS NOT SUBJECT TO PRIVATE ENTRY.

I, William M. Scott, of Lewis and Clarke County, M. T., being the head of a family, and a native born citizen of the United States,

have on the 5th day of October, A. D. 1868, settled and improved the south half of the northwest quarter, and the north half of the south west quarter (S. ½ of N. W. ¼ and N. ½ of S. W. ¼) of section No. 17 in township No. ten (10) north of Range No. three (3) west, in the district of lands subject to sale at the Land Office at Helena, Montana Territory, and containing one hundred and sixty acres, which land has not been offered at public sale, and thus rendered subject to private entry: and I do hereby declare my intention to claim said tract of land as a pre-emption right, under the provisions of act of 4th September, 1841.

Given under my hand this fifth day of October, A. D. 1868.

WILLIAM M. SCOTT.

In presence of GEO. W. STOREY.

Mr. Geo. M. Bourquin was then recalled as a witness on behalf of the plaintiff, and having been duly sworn testified as follows:

Q. Mr. Bourquin will you please state the method of issuing an order to show cause why an entry should not be cancelled in the land office, and whether you are able to keep copies of such notices in the land office, and if not, why not?

A. When the time arrives that notice should be given, we issue a notice on a printed blank. The form is printed and we fill in the names of the different entrymen, and this sent to the parties by registered mail, no copy being retained in the office. No copies are preserved. I believe you asked me for a copy of notice of cancellation, cancelling the entry of—to produce certified copy of letter sent to Wm. McLean, dated June 2, 1879, directing him to show cause within thirty days whether his homestead entry for this land should not be cancelled, and I made a thorough search and satisfied myself it was not of record.

On cross-examination the witness testified as follows:

"I do not know that any such notice was ever sent out of my office. I would only know what the records show. I have never seen any such record: and I do not know what the custom of the Department was with my predecessors. When the paper is sent out by registered mail we receive a receipt, and send it to the Department as evidence that the notice has been served. The letter transmitting it is the only record we have. We make no other entry.

PLAINTIFF RESTS.

Mr. Walter H. Little was then called as a witness on behalf of the defendants, and having been duly sworn testified that he is a real estate broker; that he is acquainted with the value of the land

in controversy here; and that its value is about $260 or $300 per acre, or between $20.000 and $24,000.

Mrs. Maria Amacker was then called as a witness on behalf of the defendants, and being sworn, testified as follows:

"My name is Maria Amacker. I was once Maria McLean, the wife of William H. McLean—the one who filed a homestead entry on this land. He died in 1882. I afterward applied for a patent to the premises in dispute; and received a patent to the premises."

The patent from the United States of America to Maria McLean, widow of William H. McLean, deceased, for the W. ½ of N. W. ¼, S. E. ¼ of N. W. ¼, and S. W. ¼ of N. E. ¼, Sec. 17, Tp. 10 N., R. 3 W, was then introduced in evidence, which patent is as follows, to-wit:

The United States of America.

Certificate }
No. 1133. }

To all Whom these Presents Shall Come—GREETING:

WHEREAS: Maria McLean, widow of Wm. H. McLean, deceased, of Lewis and Clarke County, Montana Territory, has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Helena, Montana Territory, whereby it appears that full payment has been made by the said Maria McLean according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the acts supplemental thereto, for the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section seventeen, in township ten, north of range three, west of Montana meridian, in Montana Territory, containing one hundred and sixty acres, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Maria McLean.

NOW KNOW YE, That the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, *have given and granted*, and by these presents *do give and grant* unto the said Maria McLean and to her heirs, the said tract above described,

To Have and to Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Maria McLean and to her heirs and assigns forever; subject to any vested and accrued water rights

for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the seventeenth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Inde-
[SEAL.] pendence of the United States the one hundred and eleventh.

By the President, GROVER CLEVELAND.
By M. McKean, Secretary.

Robt. W. Ross, Recorder of the General Land Office.

It was then admitted by counsel for the plaintiff that the defendants other than Maria McLean are in possession of the land in dispute as tenants under this patent, or as having obtained title through conveyances from the grantee named in the patent, and that their title is of the same quality. Counsel for defendants then introduced in evidence certified copies of the homestead application of William McLean, and all the papers connected with it, for land including the land in dispute—being all the papers required in making a homestead entry, and being the papers upon which the entry introduced in evidence by plaintiff was based.

Counsel for defendants next introduced in evidence a certified copy of the application of Maria McLean, widow of William H. McLean deceased, to purchase the W. ½ of N. W. ¼, S. E. ¼ of N. W. ¼ and S. W. ¼ of N. E. ¼ Sec. 17, Tp. 10 N. R. three west, which application is as follows, to-wit:

U. S. Land Office, }
Helena, Montana, T. }

I, Maria McLean, the widow of William H. McLean, deceased, who on the 3d day of May, A. D. 1872, made homestead entry No. 819 for the W. ½ of N. W. ¼, the S. E. ¼ of N. W. ¼ and S. W. ¼ of N. E. ¼ of Sec. 17 in Tp. 10 N. of R. 3 W. in Lewis and Clarke County, Montana Territory, containing one hundred and sixty acres and subject to entry in Helena, Montana Territory, do

hereby apply to perfect said entry, and my claim thereto, by virtue of the second section of the act of congress approved June 15th, 1880, and section 2291 of the revised statutes of the United States, and for that purpose do solemly swear that I am the widow of said William McLean; that the said William McLean was a citizen of the United States: that neither he nor I have heretofore perfected or abandoned an entry made under the homestead laws of the United States; and I further swear that neither he nor I have assigned the right to receive the repayment of the fees and commissions paid thereon at the time of making said homestead entry No. 819; that said fees and commissions have not been repaid, and that no application for such repayment has been made.

MARIA McLEAN.

I, Francis Adkinson, Register of the Land Office at Helena, M. T., do hereby certify that the above affidavit was subscribed and sworn to before me this 15th day of March, A. D. 1883.

F. ADKINSON, Register.

Said application being accompanied by certified copies of a certificate of Frank P. Sterling, Probate Judge of the County of Lewis and Clarke, Territory of Montana, to the effect that Maria McLean is the widow of William H. McLean who made the homestead entry referred to; the certificate of the Register of the Land Office at Helena, Montana, certifying that Maria McLean had purchased the tract referred to: the Receiver's receipt for the purchase money paid for said tract and an affidavit of Maria McLean to the effect that the said tract is non-mineral in character.

Counsel for the defendants then introduced in evidence a certified copy of the decision of the commissioner of the General Land Office, holding for approval for patent the cash entry of Maria McLean of the lands in question, which decision is a follows, to-wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C.,
Feb. 20th, 1885.

Register and Receiver, Helena, Montana Ter.

GENTLEMEN—I have considered the cash entry of Maria McLean, widow of Wm. McLean, No. 1134, made March 15, 1883, under Sec. 2 of the act of June 15, 1880, (21 Stat. 237) on the W. ½ of N. W. ¼, S. E. ¼ N. W. ¼ and S. W. ¼ N. E. ¼ Sec. 17 T. 10 N. R. three West.

Said tracts are within the withdrawal of odd numbered sections for the benefit of the grant to the Northern Pacific Railroad Company, upon the map of general route of said Company's road filed in

this office Feb. 21st, 1872, ordered by letter from this office dated April 22, received at your office May 6th, 1872.

They are also within the forty mile (granted) limits of the definite located line of said company's road, the map of which was filed in this office, July 6, 1882.

The records show that the pre-emption declaratory statement covering said tracts were filed as follows :

No. 75, by A. J. Wetter, N. W. ¼ N. W. ¼, with other tracts, May 13, 1868, alleging settlement same day.

No. 179, by Wm. M. Scott, S. ½ N. W. ¼, with other tracts, Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. ½ N. W. ¼, and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

No. 252, by Jerome S. Glick, S. W. ¼ N. E. ¼, with other tracts, Nov. 27, 1868, alleging settlement the same day.

No. 776, by Robt. C. Wallace, S. W. ¼ N. E. ¼ with other tracts, Dec. 13, 1869, alleging settlement the same day.

May 3, 1872, Wm. McLean made homestead entry No. 819 on said W. ½ N. W. ¼, S. E. ¼ N. W. ¼, and S. W. ¼ N. E. ¼.

The letter directing the withdrawal of the lands for the grant stated that the order would take effect from the date of its receipt at your office.

March 22, 1873, the Secretary of the Interior decided (Copp L. L., 1875, p. 377) that the withdrawal took effect upon the filing and acceptance of the map of general route.

McLean's entry having been made after the filing of such map, was held for cancellation by this office Dec. 1, 1874, subject to appeal within sixty days.

No appeal was taken from this action. Under date July 3, 1879, the local officers reported that McLean had been duly notified pursuant to office circular of Dec. 20, 1873, to show cause within thirty days why his entry should not be cancelled for failure to make proof of compliance with law within the statutory period, and that he had taken no action in the matter, and recommended the cancellation of his entry. In view of the facts that the entry had been held for cancellation in 1874, and that McLean had allowed the statutory limit to expire without making the proof required, and had also failed to establish his claim after due notice, said entry was cancelled in this office Sept. 11, 1879, and you were so informed by letter of that date.

As shown by the certificate of the Probate Judge of Lewis and Clarke County, M. T., McLean died Aug. 20, 1882.

Mrs. McLean claims that her husband's entry was confirmed by Section One (1) of the Act of April 21, 1876: that in view of said fact the cancellation of said entry was error: and that, as his widow, she has the right to purchase under Section 2, of the Act of June 15, 1880, whereby payment of the piece of land is made equivalent to proof of compliance with the provisions of the Homestead laws.

Sec. 1 of the Act of April 21, 1876, provides that all pre-emption and homestead entries of the public lands, made in good faith by actual settlers upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts, shall be confirmed and patents for the same shall he issued to the party entitled thereto.

Section 2 of the Act of June 15, 1880, provides that persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said lands by paying the government price therefor, with credit for the amount already paid, with a further provision that this shall in no way interfere with the rights or claims of others who may have subsequently entered said lands under the homestead laws.

Counsel for the Railroad Company contends that the Act of 1876, confirms only such entries wherein the homestead laws have been complied with and proper proofs thereof have been made; that McLean never invoked the relief provided by said Act but allowed his claim to expire, and suffered it to be cancelled as heretofore stated, more than three years after the passage of said Act, without protest; that as the land had been withdrawn by legislative enactment before the entry was made, upon cancellation of the same the land became subject to the grant and the matter had become *res adjudicate* and other rights had attached at the time the Act of 1880 became a law; and that the right of the Company is held not only under the legislative withdrawal of 1872, but also under the definite location of its road in July, 1882.

This office has already decided that upon the death of a homestead entryman the right to purchase under the Act of 1880 descended to his widow. (See to R. and R. Taylor's Falls, Minn., May 21, 1883, 10 C. L. O. 90.) Also that cancellation of an entry is no bar to purchase under said Act. (Ex parte Mitchell 10 C. L. O. 36.)

It may be that the pre-emption claims herein mentioned subsisting at the date of filing the map of general route were sufficient

to except the land from the withdrawal, which it is now held took effect upon such filing, but beyond the mere fact that they were then of record there is no evidence of the validity of such claims.

The object of the Act of 1876 was to afford relief to persons who without a knowledge of the withdrawal had made entries on lands prior to receipt of notice of such withdrawal at the local office since, as in this case, where there was a prior legislative withdrawal, such entries could not have been perfected without such legislation. It is true the act required the proof of the compliance with the provisions of the homstead law should be made.

Upon the passage of the act of 1880, however, it became optional with a homestead entryman to make proof of such compliance or to purchase the land, and such payment is accepted in lieu of proof. (A. G. and W. U. T. Co. vs. Martin, 10 C. L. O., 329.)

McLean's homestead entry is clearly within the terms of the act of 1880, in lieu of making proof of the compliance with the provisions of the homestead laws as to residence and cultivation was not affected by the definite location of the company's road is, in my opinion, settled by the action of this office and the Department in the case of O'Dillon B. Whitford against said company. In that case Whitford had a homestead entry subsisting which excepted the land from the legislative withdrawal on general route. His entry was cancelled in 1879 for failure to make proof within the statutory period.

After the road had been definitely located he was allowed to purchase under the act of 1880. Dec. 1, 1883, his cash entry was considered in this office and held for approval for patent upon the ground that his homestead excepted the land from the withdrawal on general route and from the grant. This decision was affirmed by the Honorable Acting Secretary of the Interior on appeal, Jan. 7, 1885.

In the case at bar the act of 1876 took the land out of the withdrawal on general route, and prior to definite location of the road, the act of 1880 conferred upon the entryman a right to pay for the same in place of making proof as required prior to that time, which right, under the decision above cited, was not affected by the definite location of the road, and, upon his death, descended to his widow.

Mrs. McLean's cash entry of the land in question is accordingly held for approval for patent, subject to appeal by the railroad company within sixty days.

Notice of this action will be given the parties in interest through their resident attorneys by letters of even date herewith.

Very respectfully,

N. C. McFARLAND.
Commissioner.

Counsel for defendants then introduced in evidence a certified copy of the appeal by the Northern Pacific Railroad Company from the decision of the Commissioner of the General Land Office holding for approval for patent the cash entry of Maria McLean: together with the specifications of error on said appeal.

Counsel for the defendants next introduced in evidence a certified copy of the decision of the Acting Secretary of the Interior affirming the decision of the Commissioner of the General Land Office and sustaining the application of Maria McLean to purchase the premises in dispute, which division is as follows, to-wit:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, March 28th, 1887.

Northern Pacific R. R. Co.
vs.
Maria McLean.
} Entry within limits of land grant prior to notice of withdrawal.

The Commissioner of the Land Office.

SIR—William McLean made homestead entry of the W. ½ of N. W. ¼, S. E. ¼ of N. W. ¼ and S. W. ¼ of N. E. ¼ Sec. 17. T. 10 N. R. three west, Helena, Montana, May 3, 1872. This tract is within the limits of the withdrawal of the odd numbered sections for the benefit of the Northern Pacific Railroad Company, upon map of general route filed February 21st, 1872. The withdrawal was made February 21st, 1872, notice of which was received at the local office May 6th, 1872. It is also within the forty mile limit of said road, as fixed by the map of definite location, filed July 6, 1882.

The letter of withdrawal directed that it should take effect from the date of its receipt at the local office. Subsequently the Secretary decided that said withdrawal took effect upon the filing and acceptance of the map of general route. Whereupon on December 1st, 1873, McLean's entry was held for cancellation, subject to appeal, but no appeal was taken from said decision.

July 3, 1879, the local officers reported that McLean had been notified, pursuant to office circular of December 20, 1873, to show cause within thirty days why his entry should not be cancelled for failure to make proof of compliance with the law within the statutory period, and failing to respond to such notice, his entry was cancelled September 11, 1879, and no appeal was taken from that action.

McLean died the 20th day of August, 1882, and Maria McLean, his widow, on March 15, 1883, made application to purchase said tract under the act of June 15, 1880, upon the ground that her husband's entry being confirmed by the first section of the act of April 21, 1876 (19 Stat. 35.) that payment for the land under the

act of June 15, 1880, is equivalent to proof of compliance with the provisions of the homestead laws.

Your office awarded to Mrs. McLean the right to purchase, holding that under the act of June 15, 1880, it became optional with a homestead entryman, either to make proof of the compliance with the provisions of the homestead law, or to purchase the land, and that payment for the land is accepted in lieu of such proof, from which decision the company appealed. At the date of the withdrawal this tract was covered by the following pre-emption filings:

A. J. Wetter for the N. W. ¼ of N. W. ¼ with other tracts May 13, 1868, alleging settlement same day.

Wm. M. Scott S. ½ N. W. ¼ with other tracts Oct. 5, 1868, alleging settlement same day, amended Oct. 20, 1869, still covering said S. ½ N. W. ¼, and again amended Oct. 14, 1872, to No. 2807, excluding said tract.

Jerome S. Glick S. W. ¼ of N. E. ¼ with other tracts November 27, 1868, alleging settlement same day.

Robert C. Wallace, S. W. ¼ of N. E. ¼ with other tracts December 13, 1869, alleging settlement same day.

Prior to the Act of July 14, 1870, no time had been prescribed within which pre-emptors were required to make proof and payment for their claims on unoffered lands, but that act provided that nothing in the act of March 27, 1854, "shall be construed to relieve settlers on lands reserved for railroad purposes from the obligation to file the proper notices of their claims, as in other cases, and all claimants of pre-emption right shall hereafter, when no shorter period of time is now prescribed by law, make proof and payment for the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

The act of March 3, 1871, extended the time within which proof and payment shall be made one year; and this provision has since been in force and was subsequently incorporated in the Revised Statutes as section 2267, which provides that all claimants of pre-emption rights upon unoffered lands shall make proper proof and payment for the land claimed within thirty months after the date prescribed for filing their declaratory notices has expired.

It therefore appears that at the date of the withdrawal a pre-emption claim to the land in controversy was subsisting capable of being perfected, and hence this tract of land not being perfected by the withdrawal for the benefit of the road, the homestead entry of McLean was not controlled by the act of April 21, 1876.

In the case of the Northern Pacific Railroad Company vs. Burt (3 L. D., 490) the Department held that the widow of an entry-

man had the right to purchase under the act of June 15, 1880, although the entry had been cancelled for faiure to make proof within the statutory period prior to the definite location of the road, and although the application to purchase was made subsequent thereto, following a long line of Departmental decisions. See also Gilbert vs. Spearing (4 L. D., 463), Holmes vs. Northern Pacific Railroad Company (5 L. D., 333).

Applying the rule to the case at bar, Mrs. McLean should be allowed to purchase, and for this reason I affirm your decision, and herewith transmit the papers.

Very respectfully,

H. L. MULDROW, Act'g Sec.

Counsel for the defendants then stated that the testimony on behalf of the defendants was closed, and the cause was thereupon submitted to the Court.

And now, the defendants by their counsel, pray that this, their bill of exceptions may be signed, sealed, allowed and made a part of the record in this cause, which is done accordingly this 14th day of December, A. D. 1892.

HIRAM KNOWLES, Judge

To Messrs. F. M. Dudley and W. E. Cullen, Attorneys for Plff.:

You will please take notice that the foregoing is a copy of the Bill of Exceptions proposed by the defendants in the above entitled cause.

MASSENA BULLARD and
THOS. C. BACH,
Attorneys for Defendants.

Received a copy of the foregoing this 6th day of December, A. D. 1892, and service thereof is hereby admitted.

F. M. DUDLY and
W. E. CULLEN,
Attorneys for Plaintiff.

Filed Dec. 6th, 1892.

GEO. W. SPROULE, Clerk.

And thereafter, to-wit, on the 14th day of December, 1892, the following further proceedings were had, and entered of record herein, in the words and figures following:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Defendants bill of exceptions as filed is this day in open Court duly signed and allowed.

It is ordered that the findings of fact herein be filed nunc pro tunc as and of date November 14, 1892, said order being made by consent of respective attorneys.

And thereupon said findings of fact were filed as of date, November 14, 1892, which said findings of fact so filed are in the words and figures following:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

Be it Remembered, That this cause came on regularly for trial on the 23d day of May, 1892, before the Court sitting without a jury, a trial by jury having been expressly waived by a stipulation in writing signed and filed in open Court by the attorneys of all the parties plaintiff and defendants herein, before the trial was commenced: and witnesses having been examined and evidence having been introduced: and the cause having been argued by counsel for both plaintiff and defendants, the same was by the Court taken under advisement.

And now, upon this 14th day of November, 1892, one of the days of the November term of said Court, the Court hereby makes and files the following special findings of fact:

Findings of Fact.

First. That on the 2d day of July, 1864, the United States of America granted to the plaintiff herein, its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, and for other purposes, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the

time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office: and whenever, prior to said time, any of said sections or parts of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And that it was provided in the Act of Congress by which the said grant was made "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided in this act: but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

2d. That plaintiff accepted the grant and constructed the road named in the act of Congress making the same.

3d. That the land in dispute is a part of an odd section within twenty miles of the definite line of said road, fixed as required by said act: and that the only title which plaintiff has or claims to have to said lands is under and by virtue of said act.

4th. That on the 21st day of February, 1872, plaintiff filed in the office of the Commissioner of the General Land Office its map of general route of said road; and that the premises in controversy were and are within twenty miles of the line of said route.

5th. That on the 6th day of May, 1872, the said map of general route of said road was received and filed in the United States District Land Office at Helena, Montana.

6th. That on the 6th day of July, 1882, the plaintiff filed in the office of the Commissioner of the General Land Office its map definitely fixing the line of said road.

7th. That on the 21st day of June, 1883, the said map definitely fixing the line of said road was received and filed in the United States Land Office at Helena, Montana.

8th. That on the 5th day of October, 1868, one William M. Scott filed in the United States Land Office at Helena, Montana, that being the land district within which said premises were then and now are situated, his pre-emption declaratory statement in writing under and in conformity with the provisions of the laws of the United States wherein and whereby he made pre-emption claim to said premises in controversy herein with other tracts, alleging settlement the same day.

9th. That said Land Office accepted and filed and entered the said declaratory statement; and that the same was duly and regularly noted upon the records thereof.

10th. That the said declaratory statement and filing is still of record in said Land Office, and has never been cancelled.

11th. That in the year 1869 the said Scott built a cabin on said premises and lived there until the fall of that year, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he removed to the city of Butte, Montana; that he never returned to said land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and on said date abandoned the same.

12th. That on the 3rd day of May, 1872, one, William McLean, duly applied, under the act of Congress approved May 20th, 1862, entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," and the acts amendatory thereof, to enter the west half of the northwest quarter, southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of Section No. 17, Township No. ten north of Range No. three west, and was then and there permitted by the Register and Receiver of the said United States Land Office at Helena, Montana, to enter said land in controversy under and in accordance with the provisions of said act of Congress, and that thereupon said McLean did make an affidavit as required by Section 2290 of the Revised Statutes of the United States, and filed the same with the Register of the said Land Office, and his said entry was then and there entered upon the records of said office.

13th. That the premises which are the subject of this action were included in both the pre-emption filing of the said Scott and the homestead filing of the said McLean.

14th. That on the 1st day of December, 1874, the Commissioner of the General Land Office wrote to the Register and Receiver of the U. S. Land Office at Helena, Montana, that the said homestead entry of said McLean was held for cancellation for the reason that the same was made subsequent to the time at which the right of the Northern Pacific Railroad Company attached thereto.

15th. That on the 3rd day of July, 1879, the Register and Receiver of the United States Land Office at Helena, Montana, wrote to the Commissioner of the General Land Office that the said William McLean had been duly notified that his homestead entry was held for cancellation; that no action had been taken by him, and recommending the said entry for cancellation.

16th. That on the 11th day of September, 1879, the Commissioner of the General Land Office wrote to the Register and Receiver aforesaid informing them that the said homestead entry had accordingly been cancelled.

17th. That there was no cancellation of McLean's homestead entry until September 11, 1879.

18th. That said McLean died in August, 1882.

19th. That on the 15th day of March, 1883, Maria McLean, the widow of said McLean, as such widow, applied to the said Land Office at Helena, Montana, to purchase said tract, and to perfect her husband's entry thereof, under the act of Congress approved June 15, 1880, and section 2291 of the Revised Statutes of the United States.

20th. That the plaintiff herein contested the said application; that the United States Land Office at Helena, Montana, awarded to the said Maria McLean the right to purchase said tract under said application; and that plaintiff herein appealed from said action to the Commissioner of the General Land Office.

21st. That on the 20th day of February, 1885, the Commissioner of the General Land Office sustained the said application of Maria McLean to purchase said tract, and affirmed the said decisions of the said Land Office at Helena, Montana, which action was sustained by the Acting Secretary of the Interior, H. S. Muldrow, on the 28th day of March, 1887, and a United States patent to the premises in dispute was awarded to the said Maria McLean.

22d. That the premises in dispute now are and were at the commencement of this action of the value of twenty thousand dollars; that the defendant, Maria McLean, is in possession of said premises in controversy herein as the grantee under the patent issued to her by the United States of America for said premises; and that the defendants other than the said Maria McLean are in possession of said premises as tenants under said patent, or as having obtained title through conveyances from the grantee named in said patent; and that all of the defendants' title is of the same quality.

23d. That the plaintiff herein, Northern Pacific Railroad Company, was incorporated and authorized to equip and maintain its railroad and telegraph line, and was vested with all the powers and

privileges necessary to carry into effect the purposes of the act, by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved July 2nd, 1864, being the act referred to in Subdivision First of these findings.

Dated November 14th, 1892.

HIRAM KNOWLES,
Judge of Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

Endorsed: No. 140. In U. S. Circuit Court, District of Montana. Northern Pacific Railroad Company, plaintiff, vs. George S. Howell et al., defendants. Findings of fact. Filed Nov. 14, 1892. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 14th day of December, 1892, the judgment of the Court in the said action was duly entered herein, which said judgment is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

This cause came on regularly for trial, on the 23rd day of May, A. D. 1892, before the Court sitting without a jury, a trial by jury having been expressly waived by stipulation in writing, signed and filed in open Court, by the attorneys of all the parties, plaintiff and defendants herein, before the trial was commenced, and on said trial F. M. Dudley and Messrs. Cullen, Sanders and Shelton appeared as counsel for plaintiff, Massena Bullard, Esq., appeared as counsel for defendants Maria Amacker and John J. Amacker, and Thomas C. Bach, Esq., appeared as attorney for the defendants George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert: whereupon George M. Bourquin and William Scott were sworn and examined on the part of the plaintiff, and Walter H. Little and Maria Amacker as witnesses on the part of the defendants, and the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation

thereon the Court delivered its findings of law and fact and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the said plaintiff, the Northern Pacific Railroad Company, do have and recover of and from the said defendants Maria Amacker, John J. Amacker, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, possession of all and singular those certain premises mentioned and described in the complaint herein, to-wit:

The south (½) one-half of the northwest (¼) quarter of Section numbered 17, of Township numbered ten (10) north of Range three west of the principal meridian of Montana. And that said plaintiff do have and recover from the said defendants its costs and disbursements in this behalf paid, laid out and expended, amounting to the sum of ninety-three 89-100 ($93.89) dollars, and that it do have execution therefor.

Judgment entered December 14th, 1892.

GEO. W. SPROULE, Clerk.

Endorsed: No. 140. In the *Circuit Court* of the United States for the Ninth Circuit, District of Montana. The Northern Pacific Railroad Company, Plaintiff, vs. Maria Amacker et al., defts. JUDGMENT. F. M. Dudley, Cullen, Sanders and Shelton, attorneys for plaintiff.

And thereafter, to-wit, on the 16th day of December, 1892, the following further proceedings were had and entered of record herein, in the words and figures following:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Counsel for respective parties present in court, and on motion of counsel for defendants it is ordered that the supersedeas bond in above entitled cause be fixed in the sum of two thousand dollars ($2,000.00).

And thereafter, to-wit, on the 22d day of December, 1892, the following further proceedings were had and entered of record herein, in the words and figures following:

(Title of Court.)

Northern Pacific Railroad Company vs. Maria Amacker et al.

Counsel for defendants in open court this day present their

petition for writ of error and assignment of errors, which were duly filed.

And thereupon bond as presented approved and filed, writ of error allowed, citation and writ of error issued.

Which said petition for writ of error, assignment of errors and bond are in the words and figures following, respectively:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

To the Judges of the above named Circuit Court:

Come now your petitioners, the above-named defendants, Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, and respectfully represent that in the records, proceedings, and also in the rendition of the judgment in the above entitled cause which is in the said Circuit Court before you, a manifest error hath happened in the matters and things in your petitioner's bill of exceptions and their assignment of errors filed herewith, more specifically set forth, to the great injury and damage of your petitioners.

WHEREFORE your petitioners pray that it may please your honors to grant unto your petitioners a writ of error to remove said cause, and the record thereof, into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any hath happened, may be duly corrected, and full and speedy justice done your petitioners; and your petitioners in duty bound will ever pray.

THOMAS C. BACH,
MASSENA BULLARD,
Attorneys for Defendants.

Let the writ of error issue as herein prayed.

HIRAM KNOWLES, Judge.

Endorsed: (Title of Court, Title of Cause.) Petition for Writ

of Error. Filed Dec. 22, 1892. Geo. W. Sproule, Clerk. Massena Bullard and Thomas C. Bach, attorneys for defendants.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, Defendants.

Now come the defendants and specify and assign the following as errors committed by the Court on the trial of the above entitled cause, to-wit:

I.

The Court erred in admitting in evidence over defendants' objection so much of the certified copy of the tract book offered by plaintiff as reads "Cancelled as per Commissioner's letter 'F' of Sept. 11th, 1879."

II.

The Court erred in admitting in evidence over defendants' objection the letter dated July 3rd, 1879, from the Register and Receiver to the Commissioner of the General Land Office, offered by plaintiff for the purpose of showing that McLean had been duly notified to appear and show cause why his entry should not be cancelled.

III.

The Court erred in admitting in evidence over defendants' objection the letter offered by plaintiff and dated Sept. 11th, 1879, from the Commissioner of the General Land Office to the Register and Receiver at Helena, Montana, cancelling the homestead entry of William H. McLean.

IV.

The Court erred in allowing over defendants' objection the witness William M. Scott to answer the following question; as to whom he left the land covered by his pre-emption filing: "When

did you leave it, if at all?" the said question being immaterial and incompetent, the said filing appearing of record valid on its face, and no abandonment having been filed.

V.

The Court erred in allowing over defendants' objection the witness William M. Scott to answer the following question as to whether he afterwards returned to the land: "Did you afterwards return to the land?" the said question being immaterial and incompetent, the said filing appearing of record valid on its face, and no abandonment ever having been filed.

VI.

The special findings found by the Court are not sufficient to support the judgment, in this: The findings show that after the grant of lands by Congress to plaintiff, and prior to the filing of its map of general route in the General Land Office, one William M. Scott, on the 5th day of October, 1868, duly made pre-emption claim to the premises in controversy, with other tracts, in conformity with the provisions of the laws of the United States; that said pre-emption filing was accepted, filed and noted on the records of the Land Office at Helena, Montana, and that said filing is still, and was at the time said map of general route was filed, of record and uncancelled.

That on the 3rd day of May, 1872, and prior to the filing of plaintiff's map of general route in the United States Land Office at Helena, Montana, one William McLean, under and in conformity with the laws of the United States, made homestead entry of the premises in controversy at said U. S. Land Office at Helena, Montana.

That Maria McLean, the widow of said William H. McLean, purchased said premises in controversy under the act of Congress of June 15th, 1880, by virtue of said homestead entry, and that thereafter, to-wit, on the 17th day of June, 1887, a United States patent for the premises in controversy was issed to said Maria McLean.

Wherefore, the defendants pray that the judgment rendered in this cause may be reversed, set aside and held for naught.

THOMAS C. BACH,
MASSENA BULLARD,
Attorneys for the Defendants.

Endorsed: (Title of Court, Title of Case.) Assignment of Errors. Filed Dec. 22, 1892. George W. Sproule, Clerk. Massena Bullard and Thomas C. Bach, Attorneys for Defendants.

United States of America.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Northern Pacific Railroad Company, Plaintiff,
vs.
Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed, and George Dibert, Defendants.

Know All Men by these Presents: That we, Maria Amacker, Walter H. Little, Alexander J. Steele, and Herbert B. Reed, as principals, and George Dana Linn and Abner B. Clements as sureties, are held and firmly bound unto the above named plaintiff, Northern Pacific Railroad Company, in the sum of two thousand (2,000) dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, and each and every of them jointly and severally firmly by these presents.

Sealed with our seals and dated this 22d day of December, A. D. 1892.

Whereas, the above named defendants, Maria Amacker, John J. Amacker, her husband, George S. Howell, George Gotthardt, Walter H. Little, Alexander J. Steele, Frank H. Pings, John Blank, Joseph Jordan, Herbert B. Reed and George Dibert, have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above entitled action by the Judge of the Circuit Court of the United States for the District of Montana.

Now, therefore, the condition of this obligation is such that if the said defendants shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation to be void, otherwise to remain in full force and virtue.

MARIA AMACKER, [SEAL.]
WALTER H. LITTLE, [SEAL.]
ALEXANDER J. STEELE, [SEAL.]
HERBERT B. REED, [SEAL.]
GEO. DANA LINN, [SEAL.]
ABNER B. CLEMENTS. [SEAL.]

In presence of
E. C. BOOM.

Approved and supersedeas allowed this 22d day of December, A. D. 1892.

HIRAM KNOWLES,
Judge.

Endorsed: (Title of Court, Title of Cause.) Bond. Filed Dec. 22, 1892. Geo. W. Sproule, Clerk. Massena Bullard and Thos. C. Bach, attorneys for defendants.

United States of America, } ss.
District of Montana. }

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, Clerk of said Circuit Court, do hereby certify and return to the honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of seventy-four pages numbered consecutively from one to seventy-four inclusive, is a true and complete transcript of the records, process, pleadings, orders, judgment and other proceedings in said cause, and of the whole thereof, as appear from the original records and files of said Court; and I do further certify and return that I have annexed to said transcript, and included within said paging the original citation, with the proof of service thereof, as also the writ of error with return thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, in the District of Montana, this 13th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

[SEAL.] GEORGE W. SPROULE, Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARIA AMACKER, ET AL.,
Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILROAD CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

MASSENA BULLARD,
AND THOS. C. BACH,
Attorneys for Plaintiffs in Error.

C. K. WELLS CO., PRINTERS AND BINDERS, HELENA, MONT.

United States Circuit Court of Appeals

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STATEMENT OF THE CASE.

This case comes to this Court on a writ of error to the Circuit Court of the United States for the District of Montana (Record, p. 1), to reverse the final judgment of that Court (Record, p. 42), which judgment was in favor of the defendant in error (being the plaintiff in the court below), and against the plaintiffs in error (being the defendants in the court below). The cause was tried without a jury, a

stipulation in writing, and signed by the attorneys for all the parties, having been filed before and at the commencement of the trial, to the effect that a jury was waived and said cause should be tried to the Court without a jury. (Record, pp. 9 and 10.) The Court filed its findings of fact, (Record, pp. 38-42), and ordered judgment in favor of defendant in error, (Record, p. 22,) and judgment was entered accordingly. (Record, pp. 42-43.)

The plaintiffs in error, during the progress of the trial, excepted to certain rulings of the Court, as specified in the assignment of errors annexed to and returned with the writ of error (Record, pp. 45 and 46,) and particularly set forth in the bill of exceptions (Record, pp. 22-37,) which was allowed by the Judge before whom said case was tried.

The defendant in error in its complaint (Record, pp. 3 & 4,) alleges in substance that at all times mentioned it was, and now is, a corporation created by an act of Congress, approved July 2, 1864, and acts and joint resolutions amendatory thereof; that it was the owner of and entitled to possession of the south half of the northwest quarter of section seventeen (17), township ten (10) north of range three (3) west of the principal meridian of Montana; that on the —— day of ————, 1890, the plaintiffs in error entered into the possession thereof and ousted it therefrom, and now unlawfully withhold possession thereof; that the land is of the value of over ten thousand dollars.

To this complaint the plaintiffs in error filed their answers (Record, p. 6-9), in which they specifically denied that

defendant in error is or ever was the owner of or entitled to the possession of any of the real estate mentioned, or that they, or any of them, ever ousted or ejected plaintiff in error therefrom or unlawfully withheld the possession thereof, or any thereof, from plaintiff.

Thereafter the Court, on the 14th day of November, 1892, one of the days of the term at which said cause was tried, filed its special findings of fact (Record, pp. 38 to 42,) and judgment was ordered for defendant in error.

One of the specifications of error is that the special findings of the Court are not sufficient to support the judgment. (Record, p. 46.)

The findings of the Court present the facts in the case fully, and are as follows (Record, pp. 38 to 42 :)

FINDINGS OF FACT.

First. That on the 2d day of July, 1864, the United States of America granted to the plaintiff herein, its successors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific Coast, and for other purposes, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title,

not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And that it was provided in the Act of Congress by which the said grant was made "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided in this act; but the provsions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the

government at a price less than two dollars and fifty cents per acre when offered for sale."

2d. That plaintiff accepted the grant and constructed the road named in the act of Congress making the same.

3d. That the land in dispute is a part of an odd section within twenty miles of the definite line of said road, fixed as required by said act; and that the only title which plaintiff has or claims to have to said lands is under and by virtue of said act.

4th. That on the 21st day of February, 1872, plaintiff filed in the office of the Commissioner of the General Land Office its map of general route of said road; and that the premises in controversy were and are within twenty miles of the line of said route.

5th. That on the 6th day of May, 1872, the said map of general route of said road was received and filed in the United States District Land Office at Helena, Montana.

6th. That on the 6th day of July, 1882, the plaintiff filed in the office of the Commissioner of the General Land Office its map definitely fixing the line of said road.

7th. That on the 21st day of June, 1883, the said map definitely fixing the line of said road was received and filed in the United States Land Office at Helena, Montana.

8th. That on the 5th day of October, 1868, one William M. Scott filed in the United States Land Office at Helena, Montana, that being the land district within which said

premises were then and now are situated, his pre-emption declaratory statement in writing under and in conformity with the provisions of the laws of the United States, wherein and whereby he made pre-emption claim to said premises in controversy herein with other tracts, alleging settlement the same day.

9th. That said Land Office accepted and filed and entered the said declaratory statement; and that the same was duly and regularly noted upon the records thereof.

10th. That the said declaratory statement and filing is still of record in said Land Office, and has never been cancelled.

11th. That in the year 1869 the said Scott built a cabin on said premises and lived there until the fall of that year, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he removed to the city of Butte, Montana; that he never returned to said land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and on said date abandoned the same.

12th. That on the 3d day of May, 1872, one William McLean duly applied, under the act of Congress approved May 20th, 1862, entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," and the acts amendatory thereof, to enter the west half of the northwest quarter, southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of Section No. 17, Township

No. ten north of Range No. three west, and was then and there permitted by the Register and Receiver of the said United States Land Office at Helena, Montana. to enter said land in controversy under and in accordance with the provisions of said act of Congress, and that thereupon said McLean did make an affidavit as required by Section 2290 of the Revised Statutes of the United States, and filed the same with the Register of the said Land Office, and his said entry was then and there entered upon the records of said office.

13th. That the premises which are the subject of this action were included in both the pre-emption filing of the said Scott and the homestead filing of the said McLean.

14th. That on the 1st day of December, 1874, the Commissioner of the General Land Office wrote to the Register and Receiver of the U. S. Land Office at Helena, Montana, that the said homestead of said McLean was held for cancellation for the reason that the same was made subsequent to the time at which the right of the Northern Pacific Railroad Company attached thereto.

15th. That on the 3d day of July, 1879, the Register and Receiver of the United States Land Office at Helena, Montana, wrote to the Commissioner of the General Land Office that the said William McLean had been duly notified that his homestead entry was held for cancellation: that no action had been taken by him, and recommending the said entry for cancellation.

16th. That on the 11th day of September, 1879, the

Commissioner of the General Land Office wrote to the Register and Receiver aforesaid informing them that the said homestead entry had accordingly been cancelled.

17th. That there was no cancellation of McLean's homestead entry until September 11, 1879.

18th. That said McLean died in August, 1882.

19th. That on the 15th day of March, 1883, Maria McLean, the widow of said McLean, as such widow, applied to the said Land Office at Helena, Montana, to purchase said tract, and to perfect her husband's entry thereof, under the act of Congress approved June 15, 1880, and section 2291 of the Revised Statutes of the United States.

20th. That the plaintiff herein contested the said application; that the United States Land Office at Helena, Montana, awarded to the said Maria McLean the right to purchase said tract under said application; and that plaintiff herein appealed from said action to the Commissioner of the General Land Office.

21st. That on the 20th day of February, 1885, the Commissioner of the General Land Office sustained the said application of Maria McLean to purchase said tract, and affirmed the said decisions of the said Land Office at Helena, Montana, which action was sustained by the Acting Secretary of the Interior, H. L. Muldrow, on the 28th day of March, 1887, and a United States patent to the premises in dispute was awarded to the said Maria McLean.

22d. That the premises in dispute now are and were at the commencement of this action of the value of twenty thousand dollars: that the defendant, Maria McLean, is in possession of said premises in controversy herein as the grantee under the patent issued to her by the United States of America for said premises; and that the defendants other than the said Maria McLean are in possession of said premises as tenants under said patent, or as having obtained title through conveyances from the grantee named in said patent; and that all of the defendants' title is of the same quality.

23d. That the plaintiff herein, Northern Pacific Railroad Company, was incorporated, and authorized to equip and maintain its railroad and telegraph line, and was vested with all the powers and privileges necessary to carry into effect the purposes of the act, by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the Northern Route," approved July 2nd, 1864, being the act referred to in Subdivision First of these findings.

Dated November 14th, 1892.

HIRAM KNOWLES,

Judge of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

The evidence further shows that when Maria Amacker (McLean's widow) was seeking to "prove up" and obtain a

patent to the land, the defendant in error filed a contest, which was finally brought before H. L. Muldrow, Acting Secretary of the Interior, who decided the cause in favor of Mrs. Amacker, and held her entry for approval for patent.

SPECIFICATION OF ERRORS.

I.

The Court erred in admitting in evidence over defendants' objection so much of the certified copy of the tract book offered by plaintiff as reads: "Cancelled as per Commissioner's letter 'F' of Sept. 11th, 1879," to the admission of which counsel for plaintiffs in error objected for the reasons:

1st. That the letter itself would be the best evidence.

2d. Because it does not appear that McLean received any notice to appear and protect his right before the department.

Which objection was by the Court then and there overruled, and said paper was admitted in evidence.

To which ruling of the Court in allowing so much of the entry as reads "Cancelled, as Commissioner's letter 'F' of Sept. 11th, 1879" in evidence, counsel for the defendants then and there excepted.

The entry mentioned is as follows (the cancellation of

McLean's entry being shown by a line drawn through the same):

~~H. E. W. ½ N. W. ¼, and S. E. ¼ N. W. ¼, and S. W. ¼ N. E. ¼.~~

("Cancelled as per Commissioner's letter 'F' of Sep. 11, 1879.)

"Sec. 17, Township No. 10, N. Range No. 3 West, 160 acres, $1.25 per acre, purchase money $16.00. Wm. H. McLean, May 3, 1872. No. of receipt and certificate of purchase, 819."

II.

The Court erred in admitting in evidence over defendants' objection the letter dated July 3d, 1879, from the Register and Receiver to the Commissioner of the General Land Office, offered by plaintiff for the purpose of showing that McLean had been duly notified to appear and show cause why this entry should not be cancelled; which letter reads as follows:

UNITED STATES LAND OFFICE,
HELENA, MONTANA, July 3d, 1879.

Hon. Com. Gen'l Land Office, Washington, D. C.:

SIR:—We have the honor to report that June 2d, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days from date of said

notice why their entries should not be cancelled, and up to this date no action has been taken.

* * * * * *

No. 819, William McLean, W. ½ N. W. ¼, S. E. ¼ N. W. ¼, and S. W. ½ N. E. ¼, Sec. 17, 10 N., 3 W., made May 3, 1872.

* * * * * *

We would respectfully recommend that these homestead entries be cancelled.

Very respectfully,

J. H. MOE, Register.

F. P. STERLING, Receiver.

The said letter was offered by defendant in error to show that McLean had been duly notified to appear and show cause why his entry should not be cancelled. [Record p. 25.]

To which evidence and offer counsel for the defendants objected, for the reason that it does not appear what notification was given to McLean, and that the letter simply states as a conclusion of law that Mr. McLean was duly notified—what notice was given not being stated.

The objection was by the Court overruled, and the said letter admitted in evidence, to which ruling of the Court, admitting the said letter in evidence, counsel for the defendants then and there excepted.

III.

The Court erred in admitting in evidence over defend-

ants' objection the letter offered by plaintiff and dated Sept. 11th, 1879, from the Commissioner of the General Land Office to the Register and Receiver at Helena, Montana, cancelling the homestead entry of William H. McLean, which letter reads as follows :

F. O. 24,576.
O. 31,284. Sept. 11, 1879.

Register and Receiver, Helena, Montana, T.:

GENTLEMEN—I am in receipt of your letters of June 4th and July 3d last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of Dec. 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz:

* * * * * * * *

No. 819, made May 3, 1872, by William McLean, W. ½ N. W. ¼. S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼ 17, 10 N., 3 W.

* * * * * * * *

In view of the fact that the above entries were held for cancellation in Nov. and Dec., 1874, and of the further facts that the parties have allowed the limitation provided by statute to expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled.

* * * * * *

Advise the parties in interest.

Very respectfully,

J. M. ARMSTRONG,
Acting Commissioner.

To which offer and evidence, counsel for the defendants objected, for the reason that it is incompetent and immaterial, and for the further reason that it does not appear that McLean was ever notified of the action of the department, or to appear and show cause why his entry should not be cancelled.

The objection was by the Court overruled, and the said letter admitted in evidence.

To which ruling of the Court, admitting said letter in evidence, Counsel for the defendants then and there excepted.

IV.

The Court erred in allowing over defendants' objection the witness William M. Scott to answer the following question, as to when he left the land covered by his pre-emption filing : "When did you leave it, if at all ?"

To which question counsel for the defendants objected as being immaterial and incompetent, for the reason that the filing appears of record and valid on its face, no abandonment having been filed.

The objection was by the Court overruled, to which ruling counsel for the defendants then and there excepted.

The answer of the witness was as follows :

A. I left it in the fall of 1869.

V.

The Court erred in allowing over the defendants' objection the witness William M. Scott to answer the following

question as to whether he afterward returned to the land: "Did you afterward return to the land?"

To which question counsel for defendants objected as being incompetent and immaterial because the filing appears of record, uncancelled, and valid on its face, no abandonment ever having been filed.

The objection was by the Court overruled, to which ruling counsel for defendants then and there excepted.

The answer of the witness was as follows:

A. No, sir.

VI.

The special findings found by the Court are not sufficient to support the judgment, in this: The findings show that after the grant of lands by Congress to plaintiff, and prior to the filing of its map of general route in the General Land Office, one William M. Scott, on the 5th day of October, 1868, duly made pre-emption claim to the premises in controversy, with other tracts, in conformity with the provisions of the laws of the United States; that said pre-emption filing was accepted, filed and noted on the records of the Land Office at Helena, Montana, and that said filing is still, and was at the time said map of general route was filed, of record and uncancelled.

That on the 3d day of May, 1872, and prior to the filing of plaintiff's map of general route in the United States Land Office at Helena, Montana, one William McLean, under and

in conformity with the laws of the United States, made homestead entry of the premises in controversy at said United States Land Office, at Helena, Montana.

That Maria McLean, the widow of said William H. McLean, purchased said premises in controversy under the act of Congress of June 15th, 1880, by virtue of said homestead entry, and that thereafter, to-wit., on the 17th day of June, 1887, a United States patent for the premises in controversy was issued to said Maria McLean.

CONTENTIONS OF PLAINTIFFS IN ERROR.

I.

The plaintiffs in error contend that the pre-emption filing of Scott, being valid upon its face and having been accepted and entered upon the records by the proper authorities, and being of record and uncancelled in the local land office at the time of the filing of the map of general route and at the time of the filing of the map of definite route, the land covered by that filing is not contained in the grant to defendant in error. All of which facts appear fully from the findings: and that the findings are not sufficient to support the judgment.

II.

The plaintiffs in error contend that their first contention is true, whether or not Scott continued to reside upon the land covered by his filing, and therefore the Court erred in

admitting Scott's testimony tending to show that he left the land in 1869 and did not afterward return.

III.

Plaintiffs in error contend that the pre-emption filing of Scott, having been made by him and accepted by the local land officers before the filing of the map of general route, and being then an existing filing valid upon its face:

a. That the land covered by said filing could not afterwards pass to the defendant in error by the grant.

b. That said land was not covered by the withdrawal clause, and was therefore subject to McLean's homestead entry.

IV.

The plaintiffs in error contend that the land, not being included in the withdrawal clause, the homestead entry of McLean was a valid entry, and the act of the Interior Department in cancelling the entry was without authority and void.

V.

The plaintiffs in error further contend that it was error to admit in evidence the letter of July 3d, 1879, written by the Local Land Officers for any purpose, and particularly for the purpose of showing that McLean was duly notified to show cause why his entry should not be cancelled.

VI.

The plaintiffs in error contend that the Court erred in admitting the letter of the Commissioner cancelling the McLean entry.

ARGUMENT.

First. In order to maintain this action, defendant in error (plaintiff below) must depend upon the strength of his own title, not upon the weakness of the title of the plaintiff in error.

Herbert vs. King, 1 Mont. Rep., 475.
City of Helena vs. Albertose, 8 Mont., 499.
Talbert vs. Hopper, 42 Cal., 398.
Treadway vs. Wilder, 8 Nev., 91.

Second. *The effect of Scott's filing:* Plaintiffs in error insist:

(*a.*) That, Scott having settled upon the land as a qualified pre-emptor, having made his declaratory statement, valid upon its face, which was filed and entered of record in the Land Office before the map of general route was filed, his filing being of record and uncancelled at the time of filing the map of definite route—the land was taken out of the grant, and this irrespective of the testimony given by Scott upon the trial.

See R. R. Co. vs. Dunmeyer, 113 U. S., 629.
R. R. Co. vs. Whitney, 132 U. S., 357.

Sioux City & I. F. Town Sur. Co. vs. Griffey, 143 U. S., 32.
Bardon vs. N. P. R. R. Co., 145 U. S., 535.
Whitney vs. Taylor, 45 Fed., 616.
McIntyre vs. Roeschlaub, 37 Fed., 556.

And under this heading we insist that the Court erred in admitting the testimony of Scott to the effect that he had left the land in the fall of 1869, and had not returned to it. See specifications of error Nos. 4 and 5 (pp. 47 and 48 of the Record), and also specified in this brief.

See cases last cited, in which it is declared :

"It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation, with an interest to defeat their claims and to come between them and the Government as to the performance of their obligations."

See R. R. Co. vs. Dunmeyer, 113 U. S., 629.
R. R. Co. vs. Whitney, 132 U. S., 357.

See also a former hearing of this cause.

N. P. R. R. Co. vs. Amacker, 49 Fed., 529

In which the Court recognizes that the Company might have selected indemnity lands (p. 553). It is quite appar-

ent that if the right to indemnity lands existed in the case, it was because the land in question was taken out of the grant, and it follows that the land never did pass to the Company.

This error was quite material, for it will be seen from an inspection of the opinion of the Court below (Record p. 16) that the Court was controlled to a great extend by the view that Scott, having left the land, his right would not destroy the claim of the company.

In this connection we refer to a position which has always been pressed by counsel for defendant in error, and which was adopted by the learned Justice before whom the cause was tried, and who was misled equally by this position as by the one to which we have referred.

The claim made by counsel and the court below (Record, p. 15,) is to the effect that the cases cited by us do not apply where the right relied upon is one based merely upon the right to pre-empt, based only upon settlement and the filing of a declaratory statement, but are confined to a pre-emption entry, where proof has been made and the purchase price actually paid in the Local Land Office; and counsel and the Court below rely upon the cases of Bohall vs. Della, 114 U. S., 47; Frisbe vs. Whitney, 9 Wall., 187, and The Yosemite case, 15 Wall., 77.

That both the counsel and the Court have misapprehended the effect of those decisions will be quite apparent

from an inspection of the case next cited, in which the distinction is plainly shown:

See Shepley vs. Cowan, 91 U. S., 330.

In this case it will be seen that the rule claimed by counsel is confined to the right of the United States as against the pre-emption claimant.

We do not claim that the United States could not have excepted such rights, viz.: the right to pre-empt; but we do insist that the United States did not include in the grant lands covered by such filings. The terms of the grant show this plainly: "Whenever on the line thereof the United States shall have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights," etc.

Surely this includes the right to buy or pre-empt,—that is, it is claim or right to purchase.

And it is well settled that the company can take nothing by presumption; that its claim to the land must come plainly within the terms of the grant.

See Bardon vs. N. P. R. R. Co., 145 U. S., 533, and cases cited.
Wilcox vs. Jackson, 13 Pet., 498.

The cases cited above from the Supreme Court of the United States do not confine the rule to a pre-emption entry as distinguished from a pre-emption filing.

In the Dunmeyer case and the case of R. R. Co. vs. Whitney (cited), it is true that a homestead entry was involved, but in the case of Sioux City, etc., vs. Griffey, and Bardon vs. N. P. R. R. Co., a pre-emption filing was involved, and both these cases quote with approval the language of the Court in the Dunmeyer case, as follows:

"The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The fact that the time to prove up had elapsed is no concern of the defendant in error. It was a matter between the United States and the claimant above.

See Whitney case, Dunmeyer case and other cases of U. S. Supreme Court.

See, also, particularly—

Whitney vs. Taylor, 45 Fed., 616.

As is said in that case, quoting from the Dunmeyer case: "With the performance of these conditions the company had "nothing to do."

The same rule has been adopted by the Land Department, which allows the claimant to prove up after the time fixed in the statute has elapsed.

See Dunlap vs. Raggio, 5 S. D., 440.
Davis vs. Davidson, 8 S. D., 417.

That the opinion of the Department is entitled to great weight.

See R. R. Co. vs. Whitney, 132 U. S., 357.

The penalty for not proving up in time, as fixed by the statute, is not forfeiture, but merely makes the land subject to "the entry of another purchaser," which the company is not.

See R. S. U. S., Sec. 2264.

(*b.*) Plaintiffs in error insist that the acceptance and recording of Scott's pre-emption entry took the land from without the grant, by virtue of Sec. 6 of the grant.

It has been held under similar grants, that the grant did not include land to which any lawful right was attached at the passage of the act creating the grant, because the lands were not "public lands" if any right had attached; because Congress could not be presumed as granting that to which others had obtained a right under another act of Congress; because (as said in the Leavenworth case):

"In the face of this, it is hard to believe that Congress meant to hold out inducements to the company to delay fixing the route of this road, until a contingency had happened, which the act did not contemplate. Besides the improbability that Congress would offer a premium for delay in making a railroad," etc.

All of these reasons apply with equal force to lands to which a right was attached when the map of general route

was attached. The language in the cases above cited is not confined to rights existing at the time of the filing of the definite map.

"The premium for delay" would be held out if lands covered by a filing when the map of general route was filed would thereafter pass to the company: if the company by delaying the filing of its definite map could discourage the settler and cause him to abandon his claim.

Moreover, it will be seen by Sec. 6 that all the "odd sections of land hereby granted shall not be," etc. Now the land granted was public land, free from other claims and rights; hence lands covered by any claim could not be withdrawn. Now, one of two conclusions must be reached: 1st, that all land within 40 miles of the general route, to which lands the company could obtain a right, were actually withdrawn when the general map was filed, and that lands within the above limit and not so withdrawn were not included in the grant; or that before one can say which lands are withdrawn by the filing of the general map, he must wait until the map of definite route shall be filed,—a difficulty noted by the learned Justice before whom this cause was heard. [Record, p. 18.]

Third—As to McLean's right.

That McLean had a right to make a homestead entry is certain—

1st. Because under the authorities cited, the land being

covered by an unexpired pre-emption filing when the general route was filed, the land was not withdrawn. See

N. P. R. R. Co. vs. Gjuve, 8 Land Dec., 380.
In re, Donovan, 8 L. D., 382.
R. R. Co. vs. Brown, 10 L. D., 662.

and the general principles announced in

Wilcox vs. Jackson, and
Bardon vs. R. R. Co., *supra*.

that land subject to a claim will not be presumed to be included in a subsequent disposition.

2d. Because the right was given by the act of April 21, 1876.

19 Stat. at Large, 35.

And this right could not be taken from him by the unauthorized act of the Interior Department.

Glidnen vs. R. R. Co., 30 Fed., 660.
N. P. R. R. Co. vs. Burt, 3 Land Dec., 490.
Shepley vs. Cowan, 91 U. S., 330.

3d. Had McLean lived he could have purchased the land under section 2 of the law of June 15, 1880 (Stat. at Large, Vol. 21, pages 237–238,) and this right was vested in his widow by section 2291, R. S., Ed. 1878.

See Whitney vs. Maxwell, 2 Land Dec., 98.
N. P. R. R. Co. vs. Burt, 3 Land Dec., 490.
N. P. R. R. Co. vs. McLean, 5 Land Dec., 529.

We respectfully submit to the Court, that upon all the questions of fact concerning the settlement of the prior pre-emption claimants and McLean, the doctrine of *res adjudicate* applies.

It appears from the Findings (Record P. 41) that there was a contest in the Land Office between McLean and the plaintiff; that, while a decision of that department upon a question of law is not decisive, still its decision of the facts is final.

See St. Louis Smelting Co. vs. Kemp, 104 U. S., 636.
U. S. vs. Minor, 114 U. S., 233.
Lee vs. Johnson, 116 U. S., 48.

It is claimed that McLean's entry being cancelled, whether correctly or not, when the definite map was filed, his claim could not defeat the claim of the defendant in error. This we deny:

1st. Because, as above stated, his filing took the land farm without the grant.

2d. Because the record itself would show that the cancellation was without jurisdiction and void.

(*a.*) Because the only authority to cancel a homestead entry is found in Section 2297, and the cancellation was made not because of abandonment, but because the time had elapsed for making final proof. And, in this regard, we submit that

the Court erred in admitting in evidence the letter of cancellation, there being no proof that notice was ever given, which error is contained in the assignment of errors.

All of which is respectfully submitted.

MASSENA BULLARD,
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Attorneys for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1892.

No. 97.

MARIA AMACKER, et al.,

Plaintiffs in error,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in error.

In Error to the Circuit Court of the United States for the District of Montana.

Brief for Defendant in Error.

FRED M. DUDLEY,

For Defendant in Error.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1892.

No. 97.

MARIA AMACKER, ET AL.,
Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought by defendant in error to recover possession of the south half of the northwest quarter of section 17, township 10 north, range 3 west of the principal meridian of Montana. The defendant in error claims title to said lands under the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route." The

third section of this act provides, among other things, as follows:

"That there be, and hereby is, granted to the "'Northern Pacific Railroad Company,' its suc- "cessors and assigns, * * * every alternate "section of public land, not mineral, designated "by odd numbers, to the amount of twenty alter- "nate sections per mile, on each side of said "railroad line, as said company may adopt, "through the territories of the United States, "and ten alternate sections of land per mile on "each side of said railroad whenever it passes "through any state, and whenever on the line "thereof, the United States have full title, not "reserved, sold, granted or otherwise appropri- "ated, and free from pre-emption or other claims "or rights at the time the line of said road is "definitely fixed, and a plat thereof filed in the "office of the commissioner of the general land "office; and whenever, prior to said time, any of "said sections or parts of sections shall have "been granted, sold, reserved, occupied by home- "stead settlers, or pre-empted, or otherwise dis- "posed of, other lands shall be selected by said "company in lieu thereof, under the direction of "the secretary of the interior, in alternate sec- "tions, and designated by odd numbers, not more "than ten miles beyond the limits of said alter- "nate sections."

The sixth section of said act provides:

"That the president of the United States shall "cause the lands to be surveyed for forty miles "in width on both sides of the entire line of said "road, after the general route shall be fixed, "and as fast as may be required by the construc- "tion of said railroad; and the odd sections of "land hereby granted shall not be liable to sale

"or entry or pre-emption before or after they "are surveyed, except by said company, as pro- "vided in this act."

The company duly accepted the terms, conditions and impositions of this act. February 21, 1872, it fixed the general route of that portion of its road opposite, and within forty miles of the land involved in this action, by filing a plat thereof in the office of the commissioner of the general land office. April 22, 1872, the commissioner of the general land office, under the direction of the secretary of the interior, transmitted to the register and receiver of the United States district land office at Helena, Montana, in which district said land was, a diagram showing the general route of said railroad; and directed them to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the limits of forty miles of such general route. May 6, 1872, this diagram and order were received and filed in the district land office.

October 5, 1868, William M. Scott settled upon, and filed in the said United States district land office at Helena a declaratory statement for, the south half of the northwest quarter and the north half of the southwest quarter of said section 17. This was the only filing or settlement upon the land until William McLean entered it May 3, 1872, over two months after the general route of

the railroad was fixed. Scott built a house on the land in the spring of 1869, and moved into it. Scott's testimony, which was received after objection and exception by plaintiffs in error, establishes that he left the land in the fall of 1869 and did not thereafter return to it. The declaratory statement has never been cancelled and is still of record in the district land office.

May 3, 1872, Wm. McLean applied under the act of congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, to enter the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of said section 17; and his entry was allowed by the register and receiver. Whether McLean ever settled upon the land does not appear.

December 1, 1874, the commissioner of the general land office wrote to the register and receiver of the United States district land office at Helena, Montana, that the homestead entry of McLean was held for cancellation because made subsequent to the reservation of said land for the railroad company.

July 3, 1879, the register and receiver of the district land office at Helena wrote the commissioner of the general land office that June 2, 1879, McLean had been notified, in accordance with land office circular of December 20, 1873, to show

cause within thirty days why his entry should not be cancelled; that he had not appeared; and recommending the cancellation of said entry.

September 11, 1879, the commissioner wrote the register and receiver, cancelling said entry.

July 6, 1882, the railroad company definitely fixed the line of its road opposite the land and within less than forty miles thereof, and filed a plat of such line in the office of the commissioner of the general land office. Thereafter the road was duly completed.

William McLean died in 1882, and March 15, 1883, his widow, Maria McLean, now Maria Amacker, the plaintiff in error, applied to enter and purchase the land under the provisions of the act of congress approved June 15, 1880, and R. S. § 2291. The railroad company contested this application; but February 20, 1885, the commissioner rendered a decision allowing her to enter, and holding the land was excluded from the railroad grant. The railroad company having appealed to the secretary, this decision was affirmed March 28, 1887. June 17, 1887, a patent was issued to Mrs. McLean for the land. The defendants, other than Mrs. Amacker, claim title by conveyances from her. The land is not mineral and is worth over $20,000.

ARGUMENT.

POINT I.

THE LAND IN CONTROVERSY WAS PUBLIC LAND TO WHICH THE UNITED STATES HAD FULL TITLE, NOT RESERVED, SOLD, GRANTED OR OTHERWISE APPROPRIATED, AND FREE FROM PRE-EMPTION OR OTHER CLAIMS OR RIGHTS, FEBRUARY 21, 1872, AT THE TIME THE GENERAL ROUTE OF SAID ROAD WAS FIXED AND A PLAT THEREOF FILED IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The only settlement or filing upon this land, until subsequent to February 21, 1872, was that of William M. Scott, who settled thereon October 5, 1868, and filed a declaratory statement therefor on the same day.* Scott abandoned the land in the fall of 1869† And unless the mere existence of the declaratory statement on the records constituted a claim or right to the land described therein, or a reservation, sale, grant or appropriation of such land, it must be held that the land was, in every sense, public land February, 21, 1872. The effect of this filing, and the weight to be given thereto, must be determined from the provisions of the pre-emption law as they were at the date of the filing.

This land, like all land in Montana, is "unof-

* Record 24, 27.

† Record 27.

fered land," that is, it has never been proclaimed for sale. Of this the court takes judicial notice.*

Elling v. *Thexton*, (Mont.) 16 Pac. Rep. 934.

U. S. v. *Williams*, (Mont.) 12 Pac. Rep. 853-4

Knight v. *U. S. Land Association*, 142 U. S. 161.

Kirby v. *Lewis*, 39 Fed. Rep. 77.

Section 10 of the act of congress approved September 4, 1841, 5 Stat. 455, provides that "From and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States or having filed his declaration of intention to become a citizen as required by the naturalization laws, who since the first day of June, A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred

* "Courts take judicial notice of the following facts * * Public and private official acts of the legislative, executive and judicial departments of this territory, and of the United States."

Section 643, Code of Civil Procedure, Complied Statutes of Montana, 1887.

and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: No person shall be entitled to more than one pre-emptive right by virtue of this act; no person who is the proprietor of three hundred and twenty acres of land in any state or territory of the United States, and no person who shall quit or abandon his residence on his own land to reside on the public land in the same state or territory, shall acquire any right of pre-emption under this act."

Section 12 of the same act requires that "prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie."

Section 13 requires "that before any person claiming the benefit of this act shall be allowed to enter such lands" he or she must make oath to certain things set forth in the section, among which is that he has not settled upon or improved the land to sell the same on speculation, but in good faith to appropriate it to his, or her, own exclusive use or benefit.

Section 15 requires "that whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under

the provisions of this act, such person shall, in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Section 5 of the act of congress approved March 3, 1843, 5 Stat. 619, provides "That claimants under the late pre-emption law, for land not yet proclaimed for sale, are required to make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has been already made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract, and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice,

and otherwise complied with the conditions of the law."

These provisions of the pre-emption law remained unchanged until the passage of the act of July 14, 1870, 16 Stat. 279.

Instructions of March 10, 1869, 2 Lester's L. L. 241.

And Scott's declaratory statement was filed under the provisions of this act of 1843.

[A.] A FILING, WITHOUT MORE, DOES NOT ATTACH A CLAIM OR RIGHT TO LAND.

The filing of a declaratory statement does not constitute an entry of the land. The distinction between the entry and the declaratory statement, under the pre-emption law, is very marked, and care should be taken not to confuse the two.

The Entry.

The entry is only made "upon paying to the United States the minimum price for such land." As a condition precedent thereto, the settler is required to "make proof of the settlement and improvement required;" and to "make oath before the register and receiver" of his or her qualifications. Twelve months are allowed from the date of settlement in which to make the entry on offered lands; on unoffered lands the time was, until July 14, 1870, limited only by the proclamation of the lands for sale. A valid pre-emption entry vests the entryman with an equitable title to the land entered, of which not even congress can deprive

him. The entry, whether made under the preemption, homestead, or other public land law, operates to segregate the land entered from the mass of public lands. It reserves and appropriates the land. Its allowance requires the exercise of *quasi* judicial functions on the part of the land officers; and if the land be subject to entry, their decision, until reversed by their superior officers, and the entry cancelled, preserves the land from other disposition.

H. & D. R. R. Co. v. *Whitney*, 132 U. S. 363-4.

Reservation of Land for Public Uses, 17 Op. Atty. Gen. 160.

Cornelius v. *Kessel*, 128 U. S. 460.

Simmons v. *Wagner*, 101 U. S. 261.

Witherspoon v. *Duncan*, 4 Wall. 218

U. S. v. *Steenerson*, 4 U. S. App. 343. 1 C. C. A. 555.

Smith v. *Ewing*, 23 Fed. Rep. 743.

Wilson v. *Fine*, 40 Fed. Rep 53.

Stimson v. *Clarke*, 45 Fed. Rep. 760.

Am. Mtge. Co. v. *Hopper*, 48 Fed. Rep. 47.

Kate Cox, 1 L. D. 52.

Whitney v. *Maxwell*, 2 L. D. 98.

Henry Cliff, 3 L. D. 217-218.

St. P. M. & M. R'y Co. v. *Forseth*, 3 L. D. 446.

Legan v. *Thomas, et al*, 4 L. D. 441.

Nyman v. *St. P. M. & M. R'y Co.*, 5 L. D. 396.

Grove v. *Crooks*, 7 L. D. 140.

James A. Forward, 8 L. D. 528.

Etnier v. *Zook*, 11 L. D. 452.
Leary v. *Manuel*, 12 L. D. 345.
Swims v. *Ward*, 13 L. D. 686.
Mathias Ebert, 14 L. D. 589.

The Filing.

The declaratory statement, o notice of intention to claim the land must, if the land be offered land, be filed within thirty days from settlement; for unoffered land, within three months from such time. It is a brief written notice, giving the date of the alleged settlement, the description of the land, and declaring the intention of the settler to claim the land under the pre-emption laws. It may be, and frequently is, transmitted to the local office by mail, or by agent, and is filed without the officers ever seeing the alleged settler, * or

* In a letter written October 23, 1857, the commissioner of the general land office says, "the declaratory statement need not be filed in person. The settler must file a written statement signed by himself or his duly authorized attorney. It may be transmitted by mail, or entrusted to an agent, but in either case, at the risk of the settler," (1 Lester's Land Laws, 464).

The commissioner in his annual report for 1885, speaking of declaratory statements, says: "These are pre-emption filings, which have never been required by office regulations to be authenticated even by a 'land office oath.' A simple 'declaration of intention,' purporting to be signed and witnessed, is all that is required to put a claim on record. The filings are not required by regulations to be made in person; they may be sent through the mails, and are sent, not only from within, but from without land districts, and even from distant states, where the parties are not settlers on public lands, as claimed, have never seen the lands for which the filings are made, and have never been in the state or territory in which the lands lie; and speculators cover the records with such filings." Page 70.

The form of declaratory statement prescribed by the interior department, is shown in Scott's D. S., on page 27-8 of the record.

The method of keeping a record of these declaratory statements in the land offices is prescribed in Circulars of Instructions issued

having any knowledge of the facts recited in the declaratory statement.

The filing of the statement does not represent a determination by the officers upon any of the recitals contained in the statement. They do not, as a condition precedent to allowing the filing, pass upon the qualifications of the declarant, or determine if he has made a settlement as alleged. Indeed, the statement is not required to allege facts sufficient to show that the declarant is qualified to enter land under the pre-emption

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September 15, 1841, and May 8, 1843. Under the act of September 4, 1841, a declaratory statement was not required for unoffered lands. In circular of September 15, 1841, the district land officers were instructed as follows:

"Where the land was subject to private entry at the date of the settlement made since 1st June, 1840, and prior to the passage of this act, and the settler is desirous of securing the same under this act, he must give notice of his intention to purchase the same under its provisions within three months from the passage of the law; that is, before the fourth day of December, next.

[Where the land was subject to private entry at the date of the law, and a settlement shall thereafter be made upon such land, or] where the land shall hereafter become subject to private entry, and after that period a settlement shall be made, which the settler is desirous of securing under this act, such notice of his intention must be given within thirty days after the date of such settlement. Such notice, in both (all) cases must be a written one, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act.

In the first case the proof, affidavit, and payment must be made within twelve months after the passage of this act; and in the second case, within twelve months after the date of such settlement.

These declaratory statements are to be regularly numbered by the register in the order of the date of their reception, and entered in a suitable book, columned off, to show the number, date when received, name of the party, and description of the tract claimed; and monthly abstracts of the same are to be furnished to the general land office, with your other monthly returns.

The existence of these claims should be indicated on the township plats by marking, with red ink, a cross (†) on the spot occupied by the tract claimed; and, also, with red ink, noting on the same

laws. The only question the officers are called upon to determine in filing a declaratory statement, is whether or not the land is public. The existence of a filing of record, therefore, unlike an entry, does not evidence a decision by the officers upon the facts recited in the statement. In this respect the declaratory statement bears to the entry a relation somewhat analogous to that borne by a complaint to a judgment.

The filing of a declaratory statement does not operate to reserve or appropriate the land de-

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spot the number of the declaratory statement, in neat and very small figures, so as not too much to interfere with the regular annotations which will have to be made when the regular proof and payment shall have been made by the claimant, and his entry of the tract consummated. The existence of such claims should also be noted, in pencil, in their appropriate places in the tract books." (1 Lester L. L. 362-3).

The act of March 3, 1843, having required declaratory statements to be filed for unoffered lands, the following additional instructions were issued March 8, 1843:

"The fifth section requires that similar notices or declarations in writing should be filed by settlers under the act of 4th September, 1841, on land not subject to private entry. These declarations are to be filed in your office by every such settler within three months after his settlement, except as to those whose settlements were made prior to the 3d March last; in which cases, such declarations are to be filed within three months from that date, viz.: before the 3rd June next. The register will number such statements regularly in the order of their date of reception, enter them in a suitable book prepared therefor, furnish this office with monthly abstracts from said book, and in all other respects pursue the same course in relation to them as he is required to do by the 3rd and 4th paragraphs on the second page of the circular of 15th September, 1841, in regard to the declarations therein referred to. Particular care must be taken not to confound the two species of declarations, but to keep separate files thereof, enter them in the respective books prepared for each, and in the monthly abstracts transmitted to this office, discriminate between the two by heading the one 'For land subject to private entry' and the other 'For land not yet offered for sale. " (1 Lester's L. L. 371).

This practice remains unchanged.

scribed therein, or to take it out of the category of public lands. The filing, if made by one qualified to enter the land under the pre-emption laws, confers a mere preference right of purchase as against third persons, if the land is disposed of under the public land laws; but it confers no rights as against the United States; and the land covered by such filing remains public land, open to either settlement or entry by any qualified person, subject to the possible exercise by the filer of his preference right of purchase.

Reservation of Lands for Public Uses, 17 Op. Atty. Gen. 160.

Forbes v. *Driscoll*, (Dak.) 31 N. W. Rep. 636.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 72.

Hemphill v. *Davies*, 38 Cal. 578.

Decision of Commissioner, dated Sept. 1, 1868, Zabriskie's Land Laws, 85.

Thomas v. *Drumhiller*, 1 L. D. 486,

Field v. *Black*, 2 L. D. 581.

State of Alabama, 3 L. D. 315.

Iddings v. *Burns*, 8 L. D. 224.

Walter v. *Davis*, 9 L. D. 262.

The filing of Scott was, consequently, without effect so far as the railroad grant was concerned, except in so far as it may have operated to attach to the land a "pre-emption or other claim or right." *

* The distinction between entries and filings is of the utmost importance in the case at bar; and in examining the decisions with reference to these questions, it should be kept in mind. In K. P. Ry. Co. v. Dunmeyer, 113 U. S. 629; McIntyre v. Roeschlaub et al,

In the phrase "pre-emption or other claims or rights," a pre-emption is considered indifferently as either a claim or a right. Throughout railroad land grant legislation "right of pre-emption" "pre-emption right" and "pre-emption claim" are treated as synonomous terms, and are used indifferently to designate the claim or right aris-

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37 Fed. Rep. 556; H. & D. R. R. Co. v. Whitney, 132 U. S. 357; and Sioux City etc. Land Co. v. Griffey, 143 U. S. 32, Bardon v. N. P. R. R. Co. 145 U. S. 535, 545; the lands held excluded from the grants there in question, were excluded by entries.

The reasoning of the court in H. & D. R. R. Co. v. Whitney, holding a voidable entry would exclude land from a grant; "but these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants," cannot apply to a pre-emption filing. And see: Newhall v. Sanger, 92 U. S., 761; McIntyre v. Roeschlaub et al, 37 Fed. Rep. 556; Bardon v. N. P. R. R. Co. 145 U. S. 540, 545; St. P. M. & M. Ry. Co. v. Forseth, 3 L. D. 446; St. P. M. & M. Ry. Co. v. Leech, 3 L. D. 506; Hollants v. Sullivan, 5 L. D. 115; W. & St. P. R. R. Co. 9 L. D. 653-4. S. P. R. R Co. v. Cline, 10 L. D. 31; St. L. & I. M. R. R. Co. 13 L. D. 560. Compare the following decisions with reference to pre-emption filings: N. P. R. R. Co. v. Meadows, 46 Fed. Rep. 254; Cahalan v. McTague, 46 Fed. Rep. 251. (In this case what is inadvertently called an "entry" made June 13, 1878, was a D. S. filing); McLaughlin v. Menotti, (Cal.) 26 Pac. Rep. 882; Sioux City etc. Land Co. v. Griffey, 143 U. S. 41; Claim of Lutz's Heirs, 9 Op. Atty. Gen. 515; 1 Copp's L. O. 29; 6 Copp's L. O. 142; Caldwell v. M. K. & T. R. R. Co. 8 L. D. 570; Allers v. N. P. R. R. Co. 9 L. D. 452; N. P. R. R. Co. v. Stovenour, 10 L. D. 648; N. P. R. R. Co. v. Moling, 11 L. D. 130; Kricklan v. St. P. & S. C. R. R. Co. 13 L. D. 22; N. P. R. R. Co v. Flett et al, 13 L. D. 617; Meister v. St. P. M. & M. Ry. Co., 14 L. D. 624. A declaratory statement is some times spoken of as "*prima facie* valid" "valid upon its face" or "voidable." The use of these terms ignores at once the nature and definition of a declaratory statement, and the definition of the terms used. A declaratory statement, as the name indicates, is a statement and nothing more. It can no more be "valid" or "*prima facie* valid" or "valid on its face" or "invalid" or "voidable" or "void" than can an affidavit or any other statement of facts.

ing under the pre-emption law, which, by having attached to the land, excludes it from the grant.

The first act granting lands to aid in the construction of a railroad was the act of September 20, 1850, entitled "An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," 9 Stat. 466. By this act it was provided:

> "In case it shall appear that the United States "have when the line or route of said road and "branches is definitely fixed by the authority "aforesaid, sold any part of any section hereby "granted, or that the right of pre-emption has "attached to the same," lieu lands shall be "selected "equal to such lands as the United "States have sold, or to which the right of pre-"emption has attached as aforesaid. * * * "

Substantially this same formula, using the term "right of pre-emption" is used in many of the subsequent railroad grants.

> Act of June 10, 1852, 10 Stat. 8; act of February 9, 1853, 10 Stat. 155; act of June 29, 1854, 10 Stat. 302; act of May 15, 1856, 11 Stat. 9; act of May 17, 1856, 11 Stat. 15; acts of June 3, 1856, 11 Stat. 17; id. 18; id. 20 id. 21; act of August 11, 1856, 11 Stat. 30; act of March 3, 1857, 11 Stat. 195; act of March 3, 1863, 12 Stat. 772; act of March 3, 1863, 12 Stat. 797; act of May 5, 1864, 13 Stat. 64; id. 66; act of May 12, 1864, 13 Stat. 72; act of June 25, 1864, 13 Stat. 183; act of July 1, 1864, 13 Stat. 339; act of April 10, 1866, 14 Stat. 30; act of July 4, 1866, 14 Stat. 83; id. 87; act of July 23, 1866, 14 Stat.

210; act of July 25, 1866, 14 Stat. 236; act of July 26, 1866, 14 Stat. 289; act of July 28, 1866, 14 Stat. 338; act of December 26, 1866, 14 Stat. 374.

In other acts the term used is "pre-emption claim." Thus in the act approved July 1, 1862, 12 Stat. 489, there is granted every alternate section, etc., "to which a pre-emption or homestead claim may not have attached." And see:

Act of June 2, 1864, 13 Stat. 95; act of July 2, 1864, 13 Stat. 356; and act of March 3, 1871, 16 Stat. 573.

These acts were all passed pursuant to an uniform policy, and are to be construed *in pari materia*.

"The internal improvement grants are all of "the same general character, having the same "great object in view, and are all part of one "grand system, and laws having in view the "same general purpose should be construed *in* "*pari materia* unless the intention of the legis- "lature is plainly shown to be otherwise. "Indeed, where no ambiguity exists in the law, "it should be read in the light of the uniform "construction of the other acts relating to the "same subject."

N. P. R. R. Co. Unpublished Opinion of Secretary Lamar, delivered August 15, 1887.

Where laws are enacted pursuant to a common policy, it will be presumed, in the absence of evidence to the contrary, that congress intended a similar construction to be placed upon analogous provisions therein. An intention to change such

policy should not be imputed to congress, unless the law will admit of no other construction.

Morton v. *Nebraska*, 21 Wall. 669, 671.

Mining Co. v. *Consolidated M. Co.*, 102 U. S. 167.

U. S. v. *Gear*, 3 How. 130.

State v. *Springfield*, 6 Ind. 88, *et seq.*

N. P. R. R. Co. v. *St. P. M. & M. R'y Co.*, 26 Feb. Rep. 557-8.

There is nothing in the history of these various acts, nor in the debates of congress with reference thereto, to indicate any intention to change the policy with reference to what should be sufficient, under the pre-emption law, to exclude lands from these grants. The term "right of pre-emption" had been found sufficient to protect every claim or right which congress had considered entitled to protection. The use of the term "pre-emption claim" in some of the later acts was not to remedy some defects shown by experience in the earlier acts, nor did it indicate a change in the policy of congress with reference to the nature of the interests protected. The contemporaneous enactment of laws in which the original term is used unmodified, forbids such a conclusion. And the act approved June 2, 1864, 13 Stat. 95, is conclusive that congress in these granting acts uses the terms as synonomous. This act is an amendment to the act of May 15, 1856, 11 Stat. 9, making a railroad grant from which was excepted lands to which "the right of pre-emption had attached;" and it uses the terms "pre-emption

claim" and "pre-emption right" indifferently; and both are used as synonomous with the "right of pre-emption" referred to in the original grant. *

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* As showing the congressional use of "pre-emption claim" and "pre-emption right" as synonomous, attention may be called to the debates in congress with reference to the Union Pacific act of July 2, 1864. Section 6 of a substitute introduced in the senate provided, among other things:

"That there be, and hereby is, granted to said company * * * every alternate section of the public land, designated by odd numbers, * * * to which a *pre-emption or homestead claim* may not have attached at the time the line of said road is definitely fixed; but if by reason of sale by the United States or by *pre-emption or homestead right* attaching to any such alternate section or part of a section so hereby granted * * * it shall be lawful for said company to select, locate and receive patents for so much of the other lands * * * as will make up the quantity granted to said company."

Congressional Globe, 1st Sess. 38th Cong., p. 2328.

May 21, 1864, Senator Harlan moved to amend said section to make it read:

"But if by reason of sale by the United States, or by *pre-emption or homestead right*, attaching to any such alternate section or part of a section so hereby granted * * * it shall, in either case, be lawful for said company to select, locate and receive patents for so much of the other public lands of the United States not sold, reserved, or otherwise disposed of, and to which a *pre-emption or homestead claim* may not have attached as aforesaid. * * * "

The amendment was adopted. Congressional Globe, 1st Sess. 38 Cong., p. 2398.

The act as finally approved omitted entirely the indemnity provisions.

This use of the term "pre-emption claim" is a common one.

"A pre-emption claim may be defined to be a right or interest subsisting, under the pre-emption law, in some person, to a tract of public land, which, by a further full compliance with the law, may be ripened into a perfect title."

W. P. R. R. Co. v. Spratt, Copp's Pub. Land Laws, 416.

"And so in numerous other sections is the right of pre-emption entry spoken of as a *claim*. It is frequently spoken of as a *right*. It is by the law a right demandable, to be exercised under the provisions and conditions of the law."

U. S. v. Spaulding, (Dak.) 13 N. W. Rep 260.

"I may say further I do not think the fact of making a filing alone of an application to pre-empt land, unaccompanied by any other acts ought to be considered a pre-emption claim at all, as that term is understood in law."

N. P. R. R. Co. v. Meadows, 46 Fed. Rep. 255.

The interior department has never made a distinction between those grants where the term employed is "pre-emption right," and those where it is "pre-emption claim." For over thirty years these terms, as used in the railroad grants, have by that department, been construed as synonomous. Upon that construction hundreds of cases have been decided, the title to thousands of acres depends, and it should not now be disturbed unless clearly wrong.

"The principle that the contemporaneous construction of a statute by the executive officers "of the government, whose duty it is to execute "it, is entitled to great respect, and should "ordinarily control the construction of the statute by the courts, is so firmly imbedded in our "jurisprudence, that no authorities need be cited "to support it."

Pennoyer v. *McConnaughy*, 140 U. S. 23.

Heath v. *Wallace*, 138 U. S. 582.

U. S. v. *Philbrick*, 120 U. S. 59.

U. S. v. *B. & M. R. R. Co.*, 98 U. S. 341.

U. S. v. *Graham*, 110 U. S. 221.

" 'Claim,' when used as a noun and in relation to land, has, in most of the states, a signification beyond that of a mere demand—a right not reduced to enjoyment but to be enforced against another—but it is used as well to express all the rights which a person holds and enjoys in the land. Pre-emption claims, homestead claims, and mining claims are familiar instances."

Marshall v. Shafter, 32 Cal. 191.

"A pre-emption claim is a lawful claim because regularly initiated under the laws of the country."

McLaughlin v. Menotti, (Cal.) 26 Pac. Rep. 882.

"A claimant is one having some interest in the land, which is recognized by the laws of the United States."

W. P. R. R. Co. v. Tevis, 41 Cal. 494.

This word (claim) is, in all legislation of congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent."

Iron-Silver Min. Co. v. Campbell, 135 U. S. 299.

The Laura, 114 U. S. 416.
U. S. v. *Moore*, 95 U. S. 763.
Brown v. *U. S.* 113 U. S. 571.
Robertson v. *Downing*, 127 U. S. 613.
H. & D. R. R. Co. v. *Whitney*, 132 U. S. 366.

A declaratory statement does not create a "pre-emption claim" or "right of pre-emption," nor does the mere filing of such statement attach such right to the land.

"The right of pre-emption is the right to enter "lands at the minimum price in preference to "any other person, if all the requirements of the "law are complied with. The prior settlement, "*declaratory statement*, and proof are *not* the "pre-emption, *but only the means of securing* "*the right of pre-emption*"
Nix v. *Allen*, 112 U. S. 136.

"It is, simply, the right which a person, who "has complied with certain requirements of the "law, has to purchase a portion of the public "lands at the minimum price to the exclusion of "all others. It is wholly a creature of the "statute, and is exercised and exhausted as soon "as the purchase and entry are made."
Camp v. *Smith*, 2 Minn. 138 (Gilf.)
McKean v. *Crawford*, 6 Kas. 118.
Myers v. *Croft*, 13 Wall. 296.
Aiken v. *Ferry*, 6 Saw. 87.
Dillingham v. *Fisher*, 5 Wis. 480.
J. B. Raymond, 2 L. D. 854.

The fourth section of the act of July 2, 1864, 13 Stat. 356, granting lands to the Union Pacific, provides:

"Any lands granted by this act, or the act to "which this is an amendment, shall not defeat "or impair any pre-emption, homestead, swamp "land, or *other lawful claim.*"

This is a congressional definition of a "pre-emption claim," as a lawful claim; and is conclusive as to the sense in which congress employed the term. And it must be taken in the same sense in the Northern Pacific act.

"If it can be gathered from a subsequent "statute *in pari materia*, what meaning the "legislature attached to the words of a former "statute, they will amount to a legislative dec-"laration of its meaning, and will govern the "construction of the first statute."

U. S. v. *Freeman*, 3 How. 564.

Philadelphia, etc., R. R. Co. v. *Catawissa R. R. Co.*, 53 Pa. St., 20, 39, 60.

U. S. v. *Gilmore*, 8 Wall. 330.

U. S. v. *Alexander*, 12 Wall. 180-1.

U. S. v. *Mynderse*, 7 Blatch. 490.

U. S. v. *Tilden*, 10 Ben. 173.

Johnson v. *Tompkins*, Baldwin, 582.

That this construction of the phrase "pre-emption or other claims or rights" is correct is further confirmed by the indemnity provision. The indemnity-clause provides:

"Whenever, prior to said time, any of said "sections or parts of sections, shall have been "granted, sold, reserved, occupied by home-"stead settlers, or pre-empted, or otherwise dis-"posed of, other lands shall be selected by said "company in lieu thereof."

The obvious purpose of this provision was to provide indemnity for all lands (except mineral) excluded from the grant by the terms of the granting clause. And the enumeration of the various losses for which indemnity is provided, is synonomous with the enumeration of the losses in the granting clause. The excepting terms "reserved, sold, granted," are repeated in the indemnity clause. The terms "occupied by homestead settlers, or pre-empted, or otherwise disposed of" are evidently used as the equivalent of "otherwise appropriated" and not "free from pre-emption or other claims or rights;" and give indemnity for all lands lost from those causes.

A "homestead settler" is a settler who has entered the land under the homestead law by making and filing the proper affidavit, and paying the land office fees in accordance with section 2290 Rev. Stat., but to whom the final certificate has not been issued, five years from the date of such entry not having expired.

A. T. & S. F. R. R. Co v. *Mecklim.* 23 Kas. 174.

R. R. & L. W. R'y Co. v. *Sture*, 32 Minn. 96.

Act of June 8, 1872, 17 Stat. 337.

Frank W. Hewitt, 8 L. D. 566.

The land "occupied by homestead settlers" is land entered, but for which final proof has not been made.

"Otherwise disposed of" refers to an alienation of the title to property; the assignment of it to a particular use. Of the term "dispose" in Abbott's

Law Dictionary it is said: "To dispose of property is to alienate it; to assign it to a use; bestow it; direct its ownership. Disposal or disposition; an act bestowing property, or directing its future ownership."

And the term employed in the indemnity clause as descriptive of the lands not "free from pre-emption claims or rights" is "pre-empted." Until, therefore, the land is "pre-empted" it is free from "pre-emption claim or rights."

The term "pre-empted" is further modified by the words "or otherwise disposed of." The use of the words "or otherwise" indicates the understanding by congress that the term "pre-empted" meant a disposition of the land; and is conclusive that it was here used as descriptive of the attachment of such a claim to the land under the pre-emption law as amounted to a disposition of the land.

The claim or right arising under the pre-emption law, which congress desired to protect by excluding the lands to which it had attached, from the grant, was, therefore, a lawful claim or right, * that is, it was a claim or right vesting

* It has been said that the term "lawful" cannot be imported to modify the words "claims or rights." This is true. But if congress used the terms as indicative of "lawful" claims (and it expressly so declares in the Union Pacific act of July 2, 1864), the restriction of the term to the sense in which it was used, does not violate the rule. It has, further, sometimes been said that in Newhall v. Sanger, 92 U. S. 761, the supreme court held that a "claim" need not be lawful to exclude land from a grant like that to the Union Pacific. Such statement ignores the facts of that case, and entirely misconstrues the decision. In that case it was held that the act of March 3, 1851, 9 Stat. 631, and of March 3, 1853,

in the settler, and attaching to the land by virtue of the pre-emption law, as a result of certain acts performed by him. The pre-emption law gave a right of pre-emption, or pre-emption claim, to that person only who possessed certain qualifications described in the act; that is, who was a citizen of the United States, or had declared his intention to become such, and was the head of a family, or over twenty-one years of age; who had never previously exercised the pre-emptive right, and had

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10 Stat. 244, created a reservation of all "lands *claimed* under any foreign grant or title." And it was in connection with this verb "claimed" as used in the act of 1853, that it was held to be immaterial whether lands were lawfully claimed or not. As long as they were "claimed" they were, by the acts of 1851 and 1853, "reserved" and the reservation was valid. And it was because they were "reserved" that they were held excluded from the grant; not because a claim had attached thereto, within the meaning of the railroad act. U. S. v. McLaughlin, 127 U. S. 454. The "claims" referred to in that act were expressly defined to be "lawful claims." The case is like H. & D. R. R. Co. v. Whitney, 132 U. S. 357, where the court held a voidable entry excluded land from a grant because, until cancelled, it was "such an *appropriation of the land as segregates it from the public domain.*" Nor has the supreme court ever questioned the right of a railroad company to show, for the purpose of establishing its title to land, that an apparent claim thereto, existing at the date of definite location, was, in fact, an unlawful claim, and not within the meaning of the exception.

The statement in the case of K. P. Ry. Co. v. Dunmeyer, 113 U. S. 641, and H. & D. R. R. Co. v. Whitney, 132 U. S. 357, that it was not the intention of congress to create by these grants a contestant with an interest to defeat individual claims, was in answer to an argument that the railroad company took lands not free from claims or rights at the date of grant or definite location, subject to such claims or rights; and by the extinguishment thereof without ripening into a perfect title, acquired title to the land. Bardon v. N. P. R. R. Co. 145 U. S. 544. To quote such a statement in support of an argument that congress did not intend the railroad company to show, by contest, if necessary, that an apparent claim was not, at the date of the grant or definite location, a lawful claim and within the meaning of the term as used in the grant to designate the exceptions, is an unwarranted perversion of these decisions.

not abandoned a residence on his own land in the same state or territory; and was not the proprietor of 320 acres of land in any state or territory. And the filing of a declaratory statement by one not possessing such qualifications would not attach to the land a pre-emption or other claim or right.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 70, 72, 73.

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 255.

Tatro v. *French*, (Kas.) 5 Pac. Rep. 426.

Boyce v. *Danz*, 29 Mich. 149-50.

Nix v. *Allen*, 112 U. S. 136-7.

Sanford v. *Sanford*, 139 U. S. 648.

Aiken v. *Ferry*, 6 Saw. 86-87.

McLaughlin v. *Menotti*, (Cal.) 26 Pac. Rep. 880.

Page v. *Hobbs*, 27 Cal. 486-7.

Quinn v. *Kenyon*, 38 Cal. 501-2.

Baldwin v. *Stark*, 107 U. S. 464.

W. P. R. R. Co. v. *Spratt*, Copp's Pub. Land Laws, 416.

Circular of November 7, 1871, Copp's Pub. Land Laws, 405.

Circular of August 15, 1872, Copp's Pub. Land Laws, 389.

McOuat v. *W. & St. P. R. R. Co.*, 4 Copp's L. O. 163.

Vincent v. *St. J. & D. C. R. Co.*, 4 Copp's L. O. 44.

Freeman v. *T. & P. R. R. Co.*, 2 L. D. 550.

McComber v. *C. & O. R. R. Co.*, 2 Copp's L. O. 163.

Walker's Heirs v. *California*, Copp's Pub. Land Laws, 287.

Weber v. *W. P. R. R. Co.*, 6 Copp's L. O. 19.

McMurdie v. *C. P. R. R. Co.*, 8 Copp's L. O. 36.

Blodgett v. *C. & O. R. R. Co.*, 6 Copp's L. C. 37.

Emerson v. *S. P. R. R. Co.*, 1 L. D. 390.

Mary Lewis, 3 L. D. 187.

Ross v. *Poole*, 4 L D. 116.

S. P. R. R. Co. v. *Saunders*, 6 L. D. 100.

The burden of showing such qualifications is, necessarily, upon the one asserting that such right had attached to the land. The presumption is that land remains public land, free from all claims or rights, and until the contrary is shown by evidence making at least a *prima facie* case, that presumption must control.

Patterson v. *Tatum*, 3 Saw. 170.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 72-3.

Megerle v. *Ashe*, 33 Cal. 84, 90.

Dunn v. *Schneider*, 30 Wis. 512.

McComber v. *C. & O. R. R. Co.*, 2 Copp's L. O. 163.

Walker's Heirs v. *California*, Copp's Pub. Land Laws 287.

Vincent v. *St. J. & D. C. R. R. Co.*, 4 Copp's L. O. 44.

S. P. R. R. Co. v. *Wiggins & Kellar*, 4 Copp's L. O. 123.

McOuat v. *W. & St. P. R. R. Co.*, 4 Copp's L. O. 163.

Weber v. *W. P. R. R. Co.*, 6 Copp's L. O. 19.

Blodgett v. *C. & O. R. R. Co.*, 6 Copp's L. O. 37.

McMurdie v. *C. P. R. R. Co.*, 8 Copp's L. O. 36.

Freeman v. *T. & P. R. R. Co.*, 2 L. D. 550.

S. P. R. R. v. *Saunders.* 6 L. D. 98.

The declaratory statement, being a mere statement, is not evidence as against the government or third parties, of any of the facts recited therein, or of anything other than that such a statement was filed; and it is not admissible to show, as against the railroad company, the qualifications of the declarant.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 70, 72 and 73.

Megerle v. *Ashe*, 33 Cal. 84-5, 90.

Barr v. *N. P. R. R. Co.*, 7 L. D 235.

N. P. R. R. Co. v. *Beck*, 11 L. D. 584.

N. P. R. R. Co. v. *Kranich*, 12 L. D. 384.

Schiefferly v. *Tapia*, (Cal.) 8 Pac. Rep. 878.

Hardenburg v *Lakin et al.*, 47 N. Y. 111.

Hill v. *Draper*, 10 Barb. 462-3.

Sharp v. *Spier*, 4 Hill 86.

Carver v. *Jackson*, 4 Pet. 83.

As there is no evidence showing, or tending to show, that Scott was qualified to pre-empt land, the pre-emption filing does not show that a pre-emption right or claim ever attached to the land in favor of Scott.

[B.] SCOTT ABANDONED HIS CLAIM OR RIGHT, IF ANY HE EVER ACQUIRED, PRIOR TO FEBRUARY 21, 1872, AND BY THAT ABANDONMENT THE LAND BECAME FREE THEREFROM.

The declaratory statement does not reserve or appropriate the land, even if made by a qualified settler; and it attaches a claim or right to the land only so long as the claim or right exists. When that ceases, from any cause, the land at once becomes free therefrom, notwithstanding the filing remains of record. The filing, being a mere notice of the claim, is without effect after the claim itself is extinguished. It was within the power of Scott to abandon his claim or right, if one he had, at any time.

Nix v. *Allen*, 112 U. S. 130, 136.

1 Am. & Eng. Encyclopedia of Law, title Abandonment.

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 255.

Cahalan v. *McTague*, 46 Fed. Rep. 252.

S. P. R. R. v. *Dull*, 22 Fed. Rep. 497-8.

Keane v. *Brygger*, (Wash.) 28 Pac. Rep. 654-5.

Bohall v. *Dilla*, 114 U. S. 51.

Pickett v. *Dowdall*, 2 Wash. (Va.) 106, 114.

Young v. *Goss*, (Kas.) 22 Pac. Rep. 572.

Emslie v. *Young*, 24 Kas. 739.

Ard v. *Pratt*, (Kas.) 23 Pac. Rep. 646.

Ard v. *Brandon*, (Kas.) 23 Pac. Rep. 648.

Davis v. *Butler*, 6 Cal. 511.

Fine v. *Public Schools*, 30 Mo. 166.

Eckart v. *Campbell*, 39 Cal. 256, 259.

Gluckauf v. *Reed*, 22 Cal. 471.

Pre-emption claim of James M. Slaughter, 4 Op. Atty. Gen. 640.

Titus v. *Bull, et al*, 1 L. D. 404.

N. P. R. R. Co. v. *Hess*, 2 L. D. 474.

Neilson v. *N. P. R. R. Co.*, 9 L. D. 402.

N. P. R. R. Co. v. *Flett*, 13 L. D. 617.

Van Deeren v. *Hoover*, 13 L. D. 323.

"Rights in the public lands of the United "States can only be gained either for agricultural "or municipal purposes by settlement, improve- "ment and occupancy, or in other words, by "acts of physical possession, and such rights, "until consummated by entry under the appro- "priate acts of congress, may always be aban- "doned by mere withdrawal, leaving the lands "open to any other party who desires to settle "and improve them."

Weisberger v. *Tenny*, 8 Minn. 409 (Gilf.).

The evidence shows that Scott exercised this power prior to February 21, 1872.

(*a.*) October 20, 1869, Scott filed a second declaratory statement, purporting to amend his original filing. * This second filing did not embrace an entirely separate and distinct parcel of land. The land here in controversy was included in each, but there was such a change in the original tract filed for, considered as an entirety, as to justify the designation of the land included in the second filing as a different tract. This constituted an abandonment of the first filing.

Sanford v. *Sanford*, 139 U. S. 648.

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* Record 24.

(*b.*) In the fall of 1869, Scott left the land and did not return to it; * and the court finds as a fact that Scott abandoned the land at that time. † The question of abandonment is one of fact for the jury. And the court, sitting without a jury, having found that fact, the finding, if there be evidence to warrant it, will not be disturbed.

Nor is the sufficiency of the evidence to show the abandonment questioned. The objections of plaintiffs in error to the evidence of the abandonment offered, are based entirely upon the theory that the abandonment itself is not material.

We have seen that the right, being inchoate, can be abandoned. By the abandonment, all right or claim of Scott thereto ceased. As a filing does not operate to appropriate or reserve land, or segregate it from the public domain, ‡ when the right or claim of Scott was extinguished by his abandonment, the land became public, although

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* Q. When did you leave, if at all?

A. I left in the fall of 1869.

Q. Did you afterwards return to the land?

A. No, sir.

Each question was objected to as incompetent and immaterial, for the reason that the filing appeared of record and was valid on its face. The objections were overruled: to which ruling the defendants excepted. (Record 27.)

† Eleventh finding of fact: "That in the year 1869 the said Scott built a cabin on said premises and lived there until the fall of that year, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he removed to the city of Butte, Montana, that he never returned to said land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and on said date abandoned the same." (Record 40.)

‡ See pages 14, 15, supra.

the declaratory statement remained of record, uncancelled. It is not the practice of the department to cancel such filings of record.

Circular of September 8, 1873, 1 Copp's L. O. 29.
Circular of November 7, 1879, 6 Copp's L. O. 142.
State of Alabama, 3 L. D. 317-8.
Circular of June 4, 1885, 3 L. D. 576.
N. P. R. R. Co. v. *Flett, et al*, 13 L. D. 619.

(C.) The claim or right of Scott, if any he had, expired by limitation of law, prior to February 21, 1872.

Section 15 of the act of September 4, 1841, requires the settler on offered land to make entry thereof within twelve months from the date of settlement; and if he or she should "fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and approved shall be subject to the entry of any other purchaser." On unoffered lands final proof or entry was required to be made prior to their being offered for sale.

By the act approved July 14, 1870, 16 Stat. 279, congress provided:

> "All claimants of pre-emption rights shall "hereafter, when no shorter period of time is "now prescribed by law, make the proper proof "and payment for the lands claimed, within "eighteen months after the date prescribed for "filing their declaratory notices shall have "expired; *provided*, that where said date shall "have elapsed before the passage of this act,

"said pre-emptors shall have one year after the "passage hereof in which to make such proof "and payment."

By this act Scott was required to make the proper proof and payment by July 14, 1871.

By a joint resolution approved March 3, 1871, 16 Stat. 601, entitled "A resolution for the relief of settlers on the public lands," congress provided:

"That settlers on the public lands of the United "States who have been required to make proof "and payment for their lands under the act to "extend the provisions of the pre-emption laws "to the territory of Colorado, and for other pur- "poses, approved July 14, 1870, and by instruc- "tions from the general land office under date "July 30, 1870, shall have twelve months addi- "tional time given them under which to make "such proof and payment."

The instructions from the general land office, under date July 30, 1870, are as follows:

"PUBLIC NOTICE No. 742.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"July 30, 1870.

"The following is an act approved July 14, "1870, to extend the provisions of the pre-emp- "tion laws to the territory of Colorado, and for "other purposes. * * *

"This act leaves the provisions of law as "heretofore respecting 'offered lands,' viz: "filing within thirty days and payment within "twelve months after settlement.

"The settler on surveyed 'unoffered land' "must file his or her declaratory statement "within three months from the date of his or her "settlement on such land, and within eighteen

"months from the expiration of said three "months, make the proper proof, and pay for "such land.

"Where settlers had already filed before the "passage of the act, they are required to make "proof and payment within one year from such "passage; therefore, all filings made prior to that "date will expire, by limitation of law, upon "unoffered lands, on the 14th of July, 1871.

"The settler on 'unsurveyed lands' must file "his or her declaratory statement within three "months from the date of the receipt at the dis- "trict land office of the approved plat of the "township embracing the tract upon which he "or she has settled, and, within eighteen months "from the expiration of said three months, make "the proper proof, and pay for such tract. The "proviso of the act of June 2, 1862, requiring "filing within six months from survey in the field, "and providing for filing with the surveyor gen- "eral, is repealed.

"Circular instructions to registers and receiv- "ers, giving more specific details, will shortly be "issued. In the meantime, those officers will "be governed by this notice.

Jos. S. Wilson,
Commissioner.

Copp's Pub. Land Laws, 291.

A "settler" is "one who personally occupies and resides on, or personally occupies and uses the public lands."

Pre-emptions, 3 Op. Atty. Gen. 129, 130.

Southern Pacific R. R. Grant, 16 Op. Atty. Gen. 88.

Kansas & Neosho Valley R. R. Lands, 16 Op. Atty. Gen. 183.

Peterson v. *First Div. St. P. & P. R. R. Co.*, (Minn.) 6 N. W. Rep. 615, 617.
John Russell, Copp's Pub. Land Laws 262.

And the extension of time within which to prove up, by the joint resolution of March 3, 1871, was restricted to those who were occupying the lands, as required by the pre-emption law.

Scott having abandoned the land in 1869, was not a "settler" within the meaning of the joint resolution; and could not avail himself of its provisions. His filing, therefore, expired by limitation of law, July 14, 1871; that is, his *preference* right to enter the land terminated. It is possible that, had no other right or claim intervened, he could still have entered the land.

Lansdale v. *Daniels*, 100 U. S. 113.
Megerle v. *Ashe*, 33 Cal. 83, 91-2.
Damrell v. *Meyer*, 40 Cal. 170.
Schiefferly v. *Tapia*, (Cal.) 8 Pac. Rep. 878.

But the *preference* right, the essential element of a pre-emption claim or right, expired at the time fixed in the act of July 14, 1870, within which the entry should have been made. It was fully enjoyed at the expiration of that time, whether the entry was made or not, and the land became again free from the pre-emption claim or right.

J. B. Raymond, 2 L. D. 854.
Sanford v. *Sanford*, 139 U. S. 648.

The right to enter the land, after the expiration of the time limited by law, if no other claim or right intervened, was a mere privilege given to

the settler who in all other respects complied with the pre-emption law. It was precisely the same privilege he would have had had he never filed a declaratory statement, but otherwise complied with the law.

Ellen Barker, 4 L. D. 514.

And it no more operates to attach a claim or right to the land, which would exclude it from the grant, than did the privilege which the general public enjoyed of entering, by private purchase, all "offered" lands, operate to attach a claim or right sufficient to exclude such lands from the grant. Moreover, Scott having abandoned the land, did not have even a privilege of purchasing it.

After the expiration of the time limited by law within which to make the entry, the declaratory statement, having served its purpose, is *functus officio*. And it has never been the practice of the department to formally cancel such expired filings, or expunge them from the records. Thus Scott's filing still appears of record, although the land has been patented.

Mr. Commissioner Butterfield, on April 8, 1851, said:

> "The land in question was reserved for the "Mobile & Chicago railroad under act twentieth "September, 1850, subject alone to existing "rights. The failure of the party to prove up "his claim in due time, forfeits what claim he "might otherwise have had, and it would be a "great stretch of power on the part of this office, to

"interfere with the disposition of the land, under "the act of September 20, 1850, and give it to "Mr. Thatcher on the twenty-eighth February, "1851, because he might probably have secured "it, as a pre-emptor, if he had filed the neces- "sary testimony prior to the twentieth February, "1851." Pre. Record, Vol. 26, 276-77.

November 26, 1860, Attorney General Black said:

"His failure for three years to make the nec- "essary proof and payment, takes away what- "ever equity there might have been in his case. "Had he complied with the law in matters of sub- "stance, the mistake (if it was one) in his "declaratory statement would probably have "been discovered and corrected. To approve "this claim now, would be to make it good at the "expense of overthrowing an intervening title, "which we are not authorized to do. The rail- "road company took a grant of it in 1857, dur- "ing the lifetime of Lutz, and when the land, in "consequence of his default, was subject to the "entry of any other purchaser."

Claim of Lutz's heirs, 9 Opinions Attorney General, 515.

In circular of September 8, 1873, Commissioner Drummond says:

"By the operation of law limiting the period "within which proof and payment must be "made in pre-emption cases, such claims are "constantly expiring, the settler not appearing "within such time to consummate his entry. "These expired filings are classed with those "actually abandoned or relinquished."

1 Copp's L. O. p. 29.

In circular of November 7, 1879, the department says:

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

6 Copp's L. O. 142.

January 13, 1885, the secretary of the interior said:

"If a selection embraces land subject to pre-emption or homestead, the law requires any settler intending to claim the land to put his or her claim of record within a prescribed period of thirty days or three months from settlement, depending upon the condition of the tract, as 'offered' or 'unoffered' land. If no adverse claim be filed under the law, the selection is entitled to approval. * * * Respecting lists three and four, the reason given by the register and receiver is not sufficient to authorize their rejection. An 'expired pre-emption filing' is no bar to receipt of an application for public lands, nor for suspension of an entry, and is never considered as a bar to issue of patent. Nor is it the practice to enter formal cancellation of such filings upon the books, nor take any action concerning them. They are simply treated as abandoned claims."

State of Alabama, 3 L. D. 317.

In circular of June 4, 1885, it is said:

"It is also held by the department that expired "D. S. filings are to be regarded as abandoned "claims, not requiring to be formally canceled "on the records."

3 L. D. 577.

See also:

Caldwell v. *M. K. & T. R. R. Co.*, 8 L. D. 570.

Allers v. *N. P. R. R. Co.*, 9 L. D. 452.

N. P. R. R. Co. v. *Stovenour*, 10 L. D. 648.

N. P. R. R. Co. v. *Moling*, 11 L. D. 140.

Kricklan v. *St. P. & S. C. R. R. Co.* 13 L. D. 22.

N. P. R. R. Co. v. *Flett*, 13 L. D. 619.

Meister v *St. P., M. & M. R'y Co.*, 14 L. D. 624.

Tetreault v. *N. P. R. R. Co.*, 15 L. D. 552.

The decisions of the courts are to the same effect.

Schiefferly v. *Tapia*, (Cal.) 8 Pac. Rep. 878.

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 254.

Cahalan v. *McTague*, 46 Fed. Rep. 251.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 67, 71.

Keane v. *Brygger*, (Wash.) 28 Pac. Rep. 653.

This construction is in harmony with the plain intention of congress in these grants. That intention was, not to exclude lands from the grant upon forfeited and abandoned filings, but to protect existing rights.

Ryan v. *C. P. R. R. Co.* 5 Saw. 264.

Emslie v. *Young*, 24 Kans. 741.
Young v. *Goss*, (Kas.) 22 Pac. Rep. 572.

The land in question was, therefore, public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights February 21, 1872.

POINT II.

THE LAND IN CONTROVERSY WAS RESERVED FROM SALE, PRE-EMPTION OR ENTRY, EXCEPT BY THE RAILROAD COMPANY, FROM AND AFTER FEBRUARY 21, 1872, AND M'LEAN'S ENTRY THEREOF WAS VOID.

The sixth section of the act of July 2, 1864, provides as follows:

> "Section 6. That the president of the "United States shall cause the lands to be sur- "veyed for forty miles in width on both sides of "the entire line of said road, after the general "route shall be fixed, and as fast as may be "required by the construction of said railroad; "and the odd sections of land hereby granted "shall not be liable to sale, or entry, or pre-emp- "tion before or after they are surveyed, except "by said company as provided in this act; but "the provisions of the act of September, eighteen "hundred and forty-one, granting pre-emption "rights, and the acts amendatory thereof, and of "the act entitled 'An act to secure homesteads "to actual settlers on the public domain,' "approved May twenty, eighteen hundred and "sixty-two, shall be and the same are hereby, "extended to all other lands on the line of said "road, when surveyed, excepting those hereby "granted to said company. And the reserved "alternate sections shall not be sold by the gov- "ernment at a price less than two dollars and "fifty cents per acre when offered for sale."

The legal effect of this section is to forbid the sale, pre-emption or entry of the odd-numbered sections of non-mineral public land, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, within forty miles on each side of the line of general route, after the general or preliminary route shall be fixed, by filing a map thereof with the commissioner of the general land office.

Buttz v. *N. P. R. R. Co.*, 119 U. S. 72.

St. P. & P. R'y Co. v. *N. P. R. R. Co.*, 139 U. S. 17.

U. S. v. *S. P. R. R. Co.*, 146 U. S. 599, 600.

Denny v. *Dodson*, 32 Fed. Rep. 909.

U. S. v. *N. P. R. R. Co.*, 41 Fed. Rep. 847.

N. P. R. R. Co. v. *Barden*, 46 Fed. Rep. 604.

N. P. R. R. Co. v. *Cannon*, 3 C. C. A.

N. P. R. R. Co. v. *Sanders*, 1 C. C. A. 204.

S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 468.

U. S. v. *McLaughlin*, 30 Fed. Rep. 155.

U. S. v. *Curtner*, 38 Fed. Rep. 8.

S. P. R. R. Co. v. *Wiggs*, 43 Fed. Rep. 333.

N. P. R. R. Co. v. *Lilly*, (Mont.) 9 Pac. Rep. 116.

U. S. v. *N. P. R. R. Co.* (Mont.) 12 Pac. Rep. 770.

This reservation from sale, pre-emption or entry, takes effect *eo instanti* upon filing the map of general route in the office of the commissioner of the general land office.

Buttz v. *N. P. R. R. Co.*, 119 U. S. 72.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 18.

Denny v. *Dodson*, 32 Fed. Rep. 909.
S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 468.

The company fixed the general route of its road opposite the land in controversy February 21, 1872, * and the land being then non-mineral, public land, free from claims or rights, and within forty miles of the route so fixed, it became at once subject to the provisions of the sixth section, forbidding its sale, pre-emption or entry except by the railroad company. The attempted entry of McLean, made May 3, 1872, being for land reserved from entry, was void.

Hamblin v. *Western Land Co.* 13 Sup. Ct. Rep. 353.
U. S. v. *Des Moines R. R. Co.*, 142 U. S. 528.
Bullard v. *Des Moines R. R. Co.*, 122 U. S. 176.
St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 18.
Buttz v. *N. P. R. R. Co.*, 119 U. S. 73.
Van Wyck v. *Knevals*, 106 U. S. 367.
S. P. R. R. Co. v. *Wiggs, et al*, 43 Fed. Rep. 335.
U. S. v. *Curtner*, 38 Fed. Rep. 1.
S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 468.
Denny v. *Dodson*, 32 Fed. Rep. 909.
McLaughlin v. *Menotti*, (Cal.) 26 Pac. Rep. 881.
Wilcox v. *Jackson*, 13 Pet. 512, *et seq.*
Stoddard v. *Chambers*, 2 How. 317-8.
Doolan v. *Carr*, 125 U. S. 624-5.
Best v. *Polk*, 18 Wall. 117.

* Record 39.

POINT III.

THE ACT OF CONGRESS APPROVED APRIL 21, 1876, ENTITLED "AN ACT TO CONFIRM PRE-EMPTION AND HOMESTEAD ENTRIES OF PUBLIC LANDS WITHIN THE LIMITS OF RAILROAD GRANTS IN CASES WHERE SUCH ENTRIES HAVE BEEN MADE UNDER THE REGULATIONS OF THE LAND DEPARTMENT," DOES NOT AFFECT THE RESERVATION CREATED BY THE SIXTH SECTION OF THE ACT OF JULY 2, 1864, AND DID NOT OPERATE TO CONFIRM OR CURE THE ATTEMPTED ENTRY OF M'LEAN.

The first two sections (the only sections material in this case) of the act approved April 21, 1876, 19 Stat. 35, entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the land department," provide as follows:

"Section 1. That all pre-emption and home-
"stead entries, or entries in compliance with
"any law of the United States, of the public
"lands, made in good faith, by actual settlers,
"upon tracts of land of not more than one hun-
"dred and sixty acres each, within the limits of
"any land grant, prior to the time when notice
"of the withdrawal of the lands embraced in
"such grant was received at the local land office
"of the district in which such lands are situated,
"or after their restoration to market by order of
"the general land office, and where the pre-emp-
"tion and homestead laws have been complied
"with, and proper proofs thereof have been
"made by the parties holding such tracts or par-
"cels, they shall be confirmed, and patents for
"the same shall issue to the parties entitled
"thereto."

"Section 2. That when at the time of such "withdrawal as aforesaid valid pre-emption or "homestead claims existed upon any lands "within the limits of any such grant which "afterwards were abandoned, and, under the "decisions and rulings of the land department, "were re-entered by pre-emption or homestead "claimants who have complied with the laws "governing pre-emption or homestead entries, "and shall make the proper proofs required "under such laws, such entries shall be deemed "valid, and patents shall issue therefor to the "person entitled thereto."

The commissioner of the general land office held, in deciding the contest involving this land, that the provisions of the act operated to confirm McLean's entry: * a view which the very able judge of the circuit court sanctions by certain *dicta* in his opinion herein. † We submit that these views are erroneous.

(A.) THE ACT OF APRIL 21, 1876, REFERS TO EXECUTIVE WITHDRAWALS ONLY; AND DOES NOT APPLY TO A RESERVATION CREATED BY ACT OF CONGRESS.

If the act of 1876 is to receive a construction making it apply to legislative reservations, it must be considered as modifying the laws creating such reservations, and, *pro tanto*, repealing them. It contains no words of repeal. It is purely affir-

* "In the case at bar the act of 1876 took the land out of the withdrawal on general route." (Record 34.)

† Record 16, 17, 18.

mative in its language. And if it operates to repeal the provisions of section six of the Northern Pacific grant, and similar provisions in other railroad grants, so as to make the reservation depend upon the purely discretionary act of the executive, instead of the will of congress, it repeals those provisions entirely by implication. Such repeals are not favored; and one act will not be construed to repeal another by implication, if by any reasonable construction the two can stand together.

Wood v. *U. S.*, 16 Pet. 362-3
McCool v. *Smith*, 1 Black 470-1.
State v. *Stoll*, 17 Wall. 431.
Red Rock v. *Henry*, 106 U. S. 601.
Chew Heong v. *U. S.*, 112 U. S. 549-50.
Sutherland on Stat. Const. § 148.

And in carrying out this rule of construction, a general statute will not be construed as repealing a special one, unless there is a plain indication of an intention so to do.

Third National Bank of St. Louis v. *Harrison*, 3 McC. 164.
Ex parte Crow Dog, 109 U. S. 570.
In re Mannfacturers' National Bank, 5 Biss. 502, 508.
State v. *Treasurer*, 41 Mo. 24.
Sutherland on Stat Const. § 157-8-9.

The supreme court, in *Wilcox* v. *Jackson*, 13 Pet. 514-5, construing the act of July 2, 1836, 5 Stat. 73, the provisions of which are very similar to those in the act of 1876, says:

"Now the first remark we make upon this act "is, that, when the previous law had totally "exempted certain lands from the right of pre- "emption, if there were nothing else in the case, "it would be a very strong, not to say strained "construction of this section, to hold that con- "gress meant thereby, by implication, to repeal "the former law in so important a provision."

The charter of the Northern Pacific Railroad Company is a special act; the act of April 21, 1876, is general in its terms; and there being no plain indication in the act of 1876 of an intention to repeal the provisions of the sixth section creating a legislative reservation to take effect *eo instanti* upon fixing the general route, that act will not be construed as having that effect.

The acts are not inconsistent, and both may stand. An analysis of the act of 1876 shows that it refers only to withdrawals made by executive order. It confirms entries made "in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated." It evidently contemplates a case where "notice of the withdrawal" is to be sent to the local land office.

It was the custom of the interior department to withdraw lands for the benefit of railroad grants from sale, entry, pre-emption, or other disposition,

by executive order. Such order it was the duty of the department to send to the registers and receivers of the local land offices, and this was and is designated in the phraseology of the land office as giving "notice of the withdrawal;" and it is to such withdrawal that the act has application. It forbids the construction of such executive order as taking effect from the day it was issued as against parties having a homestead or pre-emption entry upon the land, initiated after such order was sent to the local office, but before it was received, and before the parties could have had notice thereof.

The term "withdrawal" in land office phraseology refers entirely to a reservation created by executive order. Secretary Vilas, speaking of the reservation created by the sixth section of the Northern Pacific act, says:

> "The term 'withdraw,' therefore, is not accurate, and is misleading because it is otherwise employed in the usage of the land office, and then means to withhold from sale lands which would otherwise remain saleable."
>
> *N. P. R. R. Co.* v. *Miller*, 7 L. D. 120.

That congress used the term "withdrawal" in this sense is made certain by the phrase "or after their restoration to market by order of the general land office." The land office has no authority to restore lands to market withdrawn by act of congress. The department had jurisdiction to revoke its own orders of withdrawal, and restore lands withdrawn by executive order to market,

but its jurisdiction extended no further; and it is obvious from the context, and the juxtaposition of the phrases "notice of the withdrawal of the lands embraced in such grant was received at the local land office," and "or after their restoration to market by order of the general land office," that the restoration referred to, is a revocation of such a withdrawal as is referred to in the first phrase.

This construction of the act harmonizes and renders clear the terms therein used, which, else, must be taken as used with utter disregard for their ordinary and proper meaning. Thus the term "public lands."

> "The words 'public lands' are habitually used "in our legislation to describe such as are sub- "ject to sale or disposal under general laws."
>
> *Newhall* v. *Sanger*, 92 U. S. 763.

And it is not reasonable to suppose that congress in confirming entries made in "compliance with any law of the United States, of the public lands" intended to confirm an entry made upon land which by its own act it had taken out of the category of "public lands," and declared should not be subject to such entry. Nor could an entry on such reserved land be deemed an entry "in compliance with any law of the United States." An act in compliance with means in conformity with. And it certainly is a strained construction to hold that congress intended by this language to confirm an entry made, not in

compliance with, but against the express prohibition of the law.

Stoddard v. *Chambers*, 2 How. 317.

Wilcox v. *Jackson*, 13 Pet. 514.

It should be further noted that the act provides that the entries shall be "confirmed." The use of the word "confirm" is significant. It means to complete or establish that which was imperfect or uncertain. A confirmation is a species of common law conveyance. It is defined as a deed whereby a conditional or voidable estate is made absolute and inviolable by the confirmant, so far as he is able, or whereby a particular estate is increased.

Smith's Real Property, referring to Coke Lit., 295 B. and 2 Bl. Comm. 325.

An entry made upon lands reserved by act of congress does not create an imperfect or voidable estate, but creates no estate whatever. It is not voidable, but void *ab initio*.

Smelting Co. v. *Kemp*, 104 U. S. 641.

Steele v. *Smelting Co.*, 106 U. S. 452-3.

Doolan v. *Carr*, 125 U. S. 624, *et seq.*

S. P. R. R. Co. v. *Wiggs*, 43 Fed. Rep. 330.

And it is not to be presumed that congress, in using the term "confirmed" intended thereby to create an estate out of an entry which its own acts declared absolutely void. And although a homestead or pre-emption entry made upon lands reserved by order of the president was also forbidden by act of congress, the term "confirmed" is correctly used, for the reason that the act was a

legislative construction of prior orders of withdrawal. It is a legislative declaration that such orders of withdrawal are not effective until notice thereof is given to the local land office, and that entries made prior to such time were rightfully made, and are, by the act, confirmed.

This interpretation of the act has, with the exception of the opinion of the court below, received the uniform sanction of the courts called to pass upon it.

Taboreck v. *R. R. Co.*, 13 Fed. Rep. 105.

B. & M. R. R. Co. v. *Lawson*, (Iowa) 12 N. W. Rep. 231.

A. T. & S. F. R. R. Co. v. *Bobb*, 24 Kas. 673.

Emslie v. *Young*, 24 Kas. 743.

(B.) McLEAN WAS NOT AN "ACTUAL SETTLER;" AND HIS ENTRY IS NOT WITHIN THE CLASS REFERRED TO IN THE ACT OF 1876.

"Filings and entries made in good faith by "actual settlers are the only class of claims con- "firmed and made valid by said act."

McClure v. *N. P. R. R. Co.*, 9 L. D. 155.

Offut v. *N. P. R. R. Co.*, 9 L. D. 407.

Olney v. *H. & D. R. R. Co.* 10 L. D. 136.

Bond's Heirs, et al v. *Deming Townsite*, 13 L. D. 668.

It is not shown, or attempted to be shown, that McLean ever settled upon this land. The burden of making such showing rests upon the plaintiff in error; and in the absence of evidence it will not be presumed that such settlement was made.

McClure v. *N. P. R. R. Co.*, 9 L. D. 155.
Offut v. *N. P. R. R. Co.*, 9 L. D. 407.
Patterson v. *Tatum*, 3 Saw. 170.
Brown v. *Corson*, (Ore.) 19 Pac. Rep. 73.

The settlement is not required in advance of entry by the homestead law. A homestead entry is made for the purpose of settlement, and should precede the settlement.

Rev. Stat. 2290.
A. T. & S. F. R. R. Co. v. *Mecklim*, 23 Kas. 174.
Burnham v. *Starkey*, (Kas.) 21 Pac. Rep. 628.
Circular of August 25, 1866, 2 Lester's Land Laws, 261.
Tobias Beckner, 6 L. D. 134.

And the settled doctrine of the department is that it is sufficient if settlement be made within six months after entry.

Waldo v. *Schleiss*, Copp's Pub. Land Laws 234.
Frank W. Hewit, 8 L. D. 566.

And no presumption can arise from the allowance of the entry, of the existence of a fact which was not material to such allowance; and which the entryman was not required to, and did not, attempt to show.

It does not appear, therefore, that this entry came within the provisions of the act of 1876, even if it be conceded that act applied to the legislative reservation created by the sixth section of the act of July 2, 1864.

POINT IV.

M'LEAN'S ENTRY WAS CANCELLED; AND THEREBY ANY CLAIM OR INTEREST HE MIGHT OTHERWISE HAVE HAD IN OR TO THIS LAND, WAS EXTINGUISHED.

(A.) The right of McLean was extinguished December 1, 1874.

December 1, 1874, the commissioner of the general land office wrote the register and receiver of the Helena land office, that the entry of McLean was held for cancellation because made subsequent to the time the right of the railroad company attached to the land. *

We submit that this is evidence of an adjudication and determination that McLean's entry was improperly allowed; and that thereby any claim or right he might otherwise have had, was extinguished.

(B.) The cancellation of McLean's entry, September 11, 1879.

By section 2291 of the Revised Statutes it is provided that no certificate or patent for land entered under the homestead act, shall issue until the expiration of five years from the date of entry; "and if at the expiration of such time, *or at any time within two years thereafter*," the entryman makes the prescribed proof of compliance with the provisions of the act, he is entitled to a patent for the land. The law vests in the

* Fourteenth finding, Record 40.

entryman a right to the patent only when the proof is made more than five and within seven years from the date of entry. If it be not made within that period, it is without effect. Neither the interior department nor the courts are authorized to disregard this provision and extend the time.

Christy v. *Siegel*, 9 Copp's L. O. 149.
John C. Mounger, 9 L. D. 291.
Megerle v. *Ashe*, 33 Cal. 83.

(*a.*) And the department is authorized to cancel the entry at the expiration of seven years, without any notice to the entryman whatever. The law itself is notice. The entryman knows, as a matter of law, that his entry must be consummated within seven years, or not at all. If it is not so consummated, the department is not only authorized, but it is its duty to cancel the entry. If the effect of this provision of the statute is not to restore the land entered to the public domain at the expiration of seven years without final proof, without any action by the department whatsoever, (as we think it is) the land remains reserved and withdrawn from disposition in any manner, until the entry is formally cancelled; it is not susceptible of final entry by the entryman nor can anyone else acquire an interest therein. Such a state of affairs was not contemplated by congress. And the due administration of the public lands requires that such obstacles to the disposition of the land, should be removed. To require the United States to go into the courts

for the purpose of clearing from the records these evidences of a right which, if it ever existed, has become forfeited by a failure to comply with the law in regard to making final proof, can serve no purpose; and the delays attendant thereon would greatly cripple the efficiency of the department. It was not the intention that such action should be taken. The power of supervision over the public domain vested in the interior department is ample to enable it to expunge from the records these forfeited entries, and restore the lands to the public domain.

Lee v. *Johnson*, 116 U. S. 52.
Galliher v. *Cadwell*, 145 U. S. 369, 374.
U. S. v. *Steenerson*, 1 C. C. A. 559.
Swigart v. *Walker*, (Kas.) 30 Pac. Rep. 162.

And this power the department has exercised without question since the enactment of the homestead law.

(*b.*) The entry was not cancelled without notice. Whether essential or not, it was given; and McLean afforded opportunity to explain his negligence if he could.

The evidence establishes that neither the order to show cause addressed to McLean by the register and receiver of the Helena land office, nor any copy thereof, can be obtained. *

* "Plaintiff then offered in evidence a certified copy of a letter dated July 3rd, 1879, signed by the register and receiver of the United States Land Office at Helena, Montana, and addressed to the Honorable Commissioner of the general land office, Washington, D. C., for the purpose of showing that McLean had been duly notified to appear and show cause why his entry should not be cancelled, the defendant, Maria Amacker, having been required to pro-

And the letter to the register and receiver of July 3, 1879, is the best evidence procurable as to the fact that an order, purporting to be an order to show cause within thirty days from June 2, 1879, why his entry should not be cancelled, was

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duce the notice mentioned in said letter, and having failed to find any such paper among the papers of her late husband, William McLean, which said letter is as follows, to-wit:

United States Land Office,
HELENA, Montana, July 3, 1879.

Hon. Com. Gen'l Land Office, Washington, D. C.

Sir: We have the honor to report that June 2nd, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days from date of said notice, why their entries should not be cancelled, and up to this date no action has been taken.

* * * * * * * * * *

No. 819, William McLean, W½ NW¼, SE¼ NW¼, and SW¼ NE¼ sec. 17, 10 N., 3 W., made May 3, 1872.

* * * * * * * * * *

We would respectfully recommend that these homestead entries be cancelled.

Very respectfully,
J. H. MOE, Register,
(Record 25.) F. P. STERLING, Receiver.

Q. Mr. Borquin will you please state the method of issuing an order to show cause why an entry should not be cancelled in the land office, and whether you are able to keep copies of such notices in the land office, and if not, why not?

A. When the time arrives that notice should be given, we issue a notice on a printed blank. The form is printed and we fill in the names of the different entrymen, and this sent to the parties by registered mail, no copy being retained in the office. No copies are preserved. I believe you asked me for a copy of notice of cancellation, cancelling the entry of— to produce certified copy of letter sent to William McLean, dated June 2, 1879, directing him to show cause within thirty days whether his homestead entry for this land should not be cancelled, and I made a thorough search and satisfied myself it was not of record.

On cross examination the witness testified as follows:

"I do not know that any such notice was ever sent out of my office. I would only know what the records show. I have never seen any such record; and I do not know what the custom of the department was with my predecessors. When the paper is sent out by registered mail we receive a receipt, and send it to the depart-

sent to McLean. It was, under the circumstances, admissible for the purpose of showing that an order had been sent. Further, this letter was an official return made by the officers of the local office to the commissioner, in the course of their duties, as prescribed by the circular of December 20, 1873, and the recital of service, being the recital of an official act, made in a report of such act which they were, by the rules of the department, required to make, is admissible for the purpose of showing that such notice was served.

Starkweather v. *Morgan*, 15 Kan. 275.

No objection was made to the sufficiency of the letter to establish that fact. The objection offered was that the evidence offered was not competent to show that the notice sent was legally sufficient—"that Mr. McLean was *duly* notified." The letter shows that the notice purported to issue in accordance with the circular of December 20, 1873. The court will take judicial knowledge of this circular.

Elling v. *Thexton*, (Mont.) 16 Pac. Rep. 934.

U. S. v. *Williams*, (Mont.) 12 Pac. Rep. 853.

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ment as evidence that the notice has been served. The letter transmitting it is the only record we have. We make no other entry." (Record 28).

As a rule of law shown to have existed, is, in the absence of evidence to the contrary, presumed to continue; so, conversely, it will be presumed that the custom of issuing notices from the local office, shown to obtain now, obtained in 1879, when the notice to McLean issued. And under the statute of Montana, the court will take judicial knowledge that such is the fact.

By this circular a form of notice is prescribed.* It was the official duty of the district officers to send out the notice in that form to McLean. And as the evidence establishes that an order

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* CIRCULAR.

Department of the Interior,
General Land Office.
Dec. 20, 1873.

Gentleman: In a number of cases, persons who have initiated titles to the public lands under the homestead law have allowed the limitation provided by the statute to expire without making the final proof of settlement and cultivation required by that act.

Therefore, in all such cases as now exist in your district, or may hereafter arise, you will notify the parties of their non-compliance with the law, and that thirty days from date of service of notice will be allowed to each of them within which to show cause why their claims shall not be declared forfeited and their entries cancelled. At the expiration of that time you will report the reasons given, or, in case of failure, report that fact, so that in either event proper action may be had by this office. But you will in no case allow the lands embraced in such claims to be re-entered until you shall have received from this office a formal notice that the original entries have been positively cancelled. I append a form of notice which you will be pleased to adopt.

Very respectfully,
WILLIS DRUMMOND,
Commissioner.

Registers and Receivers, United States Land Offices.

FORM OF NOTICE.

A ——B——, (place of residence, or, that being unknown, address to the post office nearest to the land).

Sir: You are hereby notified that the homestead law requires final proof of settlement and cultivation to be made within two years after the expiration of five years from date of entry, and that in case of your entry No.—, for ——dated ——, the time fixed by the statute has expired without the requisite proof being filed by you. You will, therefore, within thirty days from date of service of this notice, show cause before us why your claim shall not be declared forfeited and your entry cancelled for non-compliance with the requirements of the law, so that the case may be reported to the commissioner of the general land office, for the proper action.

....., Register.

....., Receiver.

(Date)

(Copp's Pub. Land Laws 244.)

to show cause was, in fact, sent, the presumption is that the form of notice complied with the form which the departmental regulations made it the duty of the officers to use.

Lawson on Presumptive Evidence, chap. 3.
Cofield v. *McClelland*, 16 Wall. 334.
Bank of U. S. v. *Dandridge*, 12 Wheat. 69-70.
Upham v. *Hosking*, 62 Cal. 259.
Baldwin v. *Bornheimer*, 48 Cal. 433.
King v. *Whiston*, 4 Ad. & Ell. 607, 610-1.

Indeed, since by the circular it was made the duty of the register and receiver to issue to McLean immediately upon the expiration of seven years from the date of entry, an order to show cause why his entry should not be cancelled, it would be presumed from the fact that the entry was cancelled, that this duty was duly performed.

Cases cited, *supra*.

September 11, 1879, the entry was formally cancelled of record. * By this act the land,

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* Sept. 11, 1879.

Register and Receiver,
HELENA, Monrana T.

Gentlemen: I am in receipt of your letters of June 4 and July 3, last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of December 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz.:

* * * * * * * * * *

No. 819, made May 3, 1872, by William McLean, W½NW¼, SE¼ NW¼ and SW¼ NE¼, 17, 30 N. 3 W.

* * * * * * * * * *

In view of the fact that the above entries were held for cancellation in November and December, 1874, and of the further facts that the parties have allowed the limitation provided by statute to

whatever its previous condition, was restored to the public domain and rendered subject to disposition under the general land laws.

Galliher v. *Cadwell*, 145 U. S. 368, 374.

POINT V.

THE ACT OF CONGRESS APPROVED JUNE 15, 1880, DID NOT VEST ANY RIGHT OR CLAIM TO SAID LAND IN FAVOR OF WILLIAM M'LEAN OR HIS WIDOW, OR RESERVE THE SAME, OR ATTACH ANY RIGHT OR CLAIM THERETO.

By an act approved June 15, 1880, 21 Stat. 237, entitled "An act relating to the public lands of the United States," congress provided:

> "Section 1. That when any of the lands of "the United States shall have been entered and "the government price paid therefor in full no "criminal suit or proceeding by or in the name "of the United States shall thereafter be had or "further maintained for any trespasses upon or "for or on account of any material taken from "said lands and no civil suit or proceeding shall "be had or further maintained for or on account "of any trespasses upon or material taken from "the said lands of the United States in the or-"dinary clearing of land, in working a mining "claim or for agricultural or domestic purposes "or for maintaining improvements upon the land

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expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled.

* * * * * * * * * *

Advise the parties in interest.

Very respectfully,

J. M. ARMSTRONG,
Acting Commissioner.

(Record 26.)

"of any *bona fide* settler or for or on account of "any timber or material taken or used by any "person without fault or knowledge of the tres- "pass or for or on account of any timber taken "or used without fraud or collusion by any per- "son who in good faith paid the officers or agents "of the United States for the same or for or on "account of any alleged conspiracy in relation "thereto; *Provided*, that the provisions of this "section shall apply only to trespasses and acts "done or committed and conspiracies entered "into prior to March first, eighteen hundred and "seventy-nine; *And provided, further*, that de- "fendants in such suits or proceedings shall ex- "hibit to the proper courts or officers the evi- "dence of such entry and payment and shall pay "all costs accrued up to the time of such entry."

"Section 2. That persons who have hereto- "fore under any of the homestead laws entered "lands properly subject to such entry, or per- "sons to whom the right of those having so en- "tered for homesteads, may have been attempted "to be transferred by *bona fide* instrument in "writing, may entitle themselves to said lands by "paying the government price therefor, and in "no case less than one dollar and twenty-five "cents per acre, and the amount heretofore paid "the government upon said lands shall be taken "as part payment of said price: *provided*, this "shall in no wise interfere with the rights or "claims of others who may have subsequently "entered such lands under the homstead laws."

It is urged by plaintiff in error that the second section of this act operated to vest in McLean, and, after his death, in his widow, a right to purchase this land, which right was sufficient to exclude it from the grant. And this proposition of

law is set up as the basis for the secretary's decision in the contest before the department relative to this land. *

(A.) The entry of McLean is not within the terms of the act.

The act authorizes the purchase, only when the lands entered were "lands properly subject to such entry." We have seen that the land in question was reserved for the railroad company prior to McLean's attempted entry. It was not, therefore, "land properly subject to such entry."
Florida C. & P. R. R. Co. v. *Carter*, 14 L. D. 103.

(B.) The right of purchase conferred by the act was a mere privilege, which, until exercised, attached no right or claim to the land.

Was it the intention of congress by the second section of the act to vest in every person who had theretofore, under any of the homestead laws, entered land properly subject to such entry, an interest in the tract so entered, although the original entry was fraudulently made, or had been abandoned, and although it had been cancelled, because of such fraud or abandonment, ten or fifteen years, it may be, before? If such is the effect of this act, that intent necessarily takes such lands out of the category of public lands. It operates to deprive congress of the power to ap-

* Record 36-7.

propriate such lands for any of the numerous public purposes for which such property may be used by the government. It must reserve such land from sale, private entry or any other disposition, save, possibly, under the homestead act. And, since only public lands, and lands which were subject to entry under the pre-emption acts, are, by the terms of the homestead law, subject to entry under that law, and no rights or claims can be acquired to other lands thereunder, it must be held that, if the effect of the act of June 15, 1880, was to create any interest in the land originally entered and vest the same in the entryman, it operated absolutely to reserve such lands for the original entryman. The absence of limitation of time within which the entryman must make the payment, coupled with the fact that when made it would necessarily cut off all rights attaching subsequent to the date of the act, would operate, practically, to do away with the necessity of payment, since no party would settle upon, improve or seek to acquire any adverse interest in land the legal title of which was subject to be acquired at any time by the original entryman; and that entryman could thus use the land quite as well as if he had the fee, while he would be subject to none of the burdens incident to ownership.

And so, if the privilege of purchasing conferred is a preference or pre-emption privilege. If such be the construction of the act, this perpetual preference would operate equally with an

interest to reserve the land. The United States could not vest in any but the original entryman, or the person to whom he may have attempted to transfer his rights, the title to such land. If another sought to enter land upon which there had once been an entry under any of the homestead laws, improved and finally obtained a patent therefor, under the pre-emption law, by cash entry, or in any other manner than by the homestead law, the original entryman could, at any time, by exercising his preference right, acquire the better right to the land, and defeat the subsequent patent.

Pre-emptions to First Settlers, 2 Op. Atty. Gen. 367.

Pre-emptions, 3 Op. Atty. Gen. 187, 188.

Claim of Belding's Heirs, 10 Op. Atty. Gen. 56

Only very clear language would justify attributing to congress an intention thus to place the public lands beyond its control, and vest in an entryman whose conduct had not been such as to entitle him to the benefits of the homestead laws, rights far superior to any conferred by such homestead laws upon those honestly complying with their provisions.

The Yosemite Valley Case, 15 Wall. 86-7.

The language of the act does not require that such a construction should be given to its provisions. A construction of its terms as simply giving the privilege of purchasing land previously entered, if at the time of purchase such land was

public and there were no intervening rights or claims attaching thereto, gives full effect to all its provisions, is sustained by the history of the act, is in accord with the departmental interpretation thereof, and is supported by the few decisions wherein its terms have been construed.

The words "may entitle themselves" are not indicative of an intention to grant either an interest in the land or a preference right of purchase. The act does not make the right to purchase contingent upon the performance of any further act by the person seeking to avail himself of its provisions. It does not prescribe any limitation of time within which that right should be exercised. Under these circumstances the use of words in the present potential mode, indicating a mere possibility, is not consistent with an intention to vest an absolute claim to the land which should take precedence. They are words of permission, not of grant. Where the intention has been to grant a preference right or interest, the indicative mode has been uniformly employed.

It is further a noticeable fact that when congress has given a preference right of entry, it has invariably designated that right in terms as a pre-emptive or preference right. This uniform custom, coupled with the absence of such terms here, is significant that it was not, in this case, the intention to confer such pre-emption right.

Galliher v. *Cadwell*, 145 U. S. 371.

The proviso, indeed, forbids an interpretation of this act as conferring a preference right of purchase. It expressly contemplates the initiation of rights and claims which shall defeat the right of purchase. The purpose of this provision is to protect those inchoate rights and claims, such as a declaratory statement, which, not being vested rights, and insufficient to take the land out of the category of public lands, might otherwise be defeated by the purchase authorized by the act. The term "homestead laws" in the proviso is a generic term, and is intended to embrace all rights or claims that may have intervened prior to the application to purchase.

Circular of Instructions of October 9, 1880, 7 Copp's L. O. 142.
William White, 1 L. D. 55.
George W. Bishop, 1 L. D. 69.
Samuel M Mitchell, 1 L. D. 97.
Pomeroy v. *Wright*, 2 L. D. 164.
Charles W. Martin, 3 L. D. 373.
Freise v. *Hobson*, 4 L. D. 580.
Lyons v. *O'Shaughnessy*, 5 L. D. 606.
N. P. R. R. Co. v. *Elder*, 6 L. D. 409.
Clement v. *Henry*, 6 L. D. 641.
Nuttle v. *Leach*, 7 L. D. 325.
Craig v. *Howard*, 7 L. D. 329.
Puckett v. *Kaufman*, 10 L. D. 410.
Havel v. *Havel*, 12 L. D. 320.
Williams v. *Doris*, 13 L. D. 487.

This construction is in accord with the history of the act, as shown by the debates in congress

during its consideration. * Prior to the incoming administration in March, 1879, settlers upon the public lands, those who had made entry as well as mere squatters, timber speculators and others, had been permitted by the policy of the government to cut, upon the public lands, such timber as they desired, and no effort was made to protect the public domain from such waste. Under this passive attitude of the government, such trespasses had acquired gigantic proportions. Millions of feet were cut annually. Such timber, so cut, passed from the hands of the lumber men into those of innocent purchasers. With the new administration, however, commencing in March, 1879, this was changed. The government

* Second session 46th Congress, 10 Cong. Record, 128-9, 1564-1577, 3577-3585, 3627-3632, 4247-4249.

Mr. Converse, chairman of the House Public Lands committee, reporting the bill favorably, said:

"The whole scope of this bill is simply to settle litigation now pending in the United States courts, and other suits which might be brought for trespass upon the public lands. The land which was valued at $2.50 per acre is now worth less than $1.25 per acre where the timber has been taken off of it. The pending proposition simply authorizes those who have been sued, to pay for the land and the costs which have accrued in court, thus allowing the whole business of this litigation to drop. * * *" (p. 129.)

Mr. Herbert of Alabama, who introduced the bill, said:

"The land is not disposed of until the persons to whom the privilege is given to buy the lands shall actually go forward and buy them. * * * Every foot of public land that belongs to the United States now, will belong to the United States after the passage of this bill. * * * It merely lays down rules and prescribes regulations under which lands can be purchased, and then it describes the effect of the purchase of the lands; that is all. All the lands that belong to the United States will belong to it after the passage of this bill, and if persons do not see proper to go forward and enter lands under the bill, all the land will continue to belong to the government as it does now."

adopted strict measures to protect its lands and the timber thereon. Suits were initiated everywhere against parties who had cut timber in the past; and against innocent purchasers, to recover the value of the timber in their hands, as well as against the timber speculators; as well against the homestead and pre-emption settler, who had cut and disposed of timber from the land which he sought to enter, as against timber thieves. In view of the preceding quiet attitude of the government in this matter, which had been construed as a tacit permission to commit these depredations, and for the purpose of protecting those into whose hands such lumber had innocently come, and to protect entrymen who had cut and sold the timber from the land they were seeking in good faith, to enter, the act of June 15, 1880, was passed. In order, however, to render the amnesty available, it was essential that the laws should be so modified as to permit the purchase. Existing laws did not permit such cash entry in all cases. Under the homestead acts, cash purchase could only be made by commuting the entry in accordance with R. S. § 2301, and such commutation could only be made by one whose qualifications, settlement and cultivation were sufficient to authorize entry under the pre-emption acts. To protect entrymen who were not in a position to comply with R. S. § 2301, as well as those to whom the "right of those having so entered for homesteads, may have been attempted to be transferred," and all who could not, under

existing laws, have purchased the lands, was the purpose of the second section of the act of July 15, 1880. It sought to accomplish this result by authorizing the purchase of the lands once entered. It would be strange indeed if congress, in passing an act which was intended only as an act of amnesty to those who were, in the eyes of the law, criminals, should have vested in them a valuable right and interest in the land itself, prior to making such purchase; and in passing an act of amnesty, had placed a reward upon the perpetration of such criminal acts; and had given to such trespassers and others claiming the benefits of this act, a right, which, so far as congress could do it, would be a divestiture of prior vested rights. Such was not the intention of congress.

This construction of the act as conferring a mere privilege of purchasing, a privilege which gives no right or claim to the land in advance of purchase, and does not take the land out of the category of public lands, is the settled construction by the interior department.

In Nathaniel Banks, 8 L. D. 532, Secretary Noble says:

> "It seems to be claimed by counsel in the "motion for review, that a purchase under the "act of 1880 is not a new or original entry, but "a re-instatement and consummation of the "homestead entry, operating by relation from "the date of such entry. The act, however, by "protecting 'all vested rights that might inter-"vene prior to application to purchase' (George "S. Bishop, 1 L. D. 69), expressly deprives the "purchase of any operation by relation as to such

"rights, and there is nothing in the language or "reason of the law, to sustain the position con- "tended for or to indicate that anything more "was intended than the conferring upon a par- "ticular class of persons the right of private cash "entry of certain lands, operative from the date "of such entry."

And see:

N. P. R. R. Co. v. *Mathews*, 15 L. D. 81.

And this construction is sustained by:

Mulloy v. *Cook*, (Ala.) 10 So. Rep. 349.

Galliher v. *Cadwell*, 145 U. S. 369, 374.

S. C. (Wash.) 18 Pac. Rep. 68.

U. S. v. *Perkins*, 44 Fed. Rep. 671.

This unexercised privilege of purchasing is not a claim or right which will exclude land from the grant made by the act of July 2, 1864. It is, in its nature, precisely like the privilege every qualified person has to acquire lands under any of the public land laws. It is no more a claim or right to the land, than is the common privilege of purchasing "offered" lands. As, notwithstanding the existence of the privilege, the land remains open to disposition under the general public land laws, it remains public land in the fullest sense of the word.

Newhall v. *Sanger*, 92 U. S. 763.

And if otherwise within the terms of the grant will pass under an act excluding lands reserved, sold, granted or otherwise appropriated, and not free from pre-emption or other claims or rights.

N. P. R. R. Co. v. *Mathews*, 15 L. D. 81.

Mullroy v. *Cook*, (Ala.) 10 So. Rep. 349.

POINT VI.

DEFENDANT IN ERROR ACQUIRED TITLE TO THIS LAND BY DEFINITELY FIXING THE LINE OF ITS ROAD OPPOSITE THERETO, AND WITHIN FORTY MILES THEREOF, AND FILING A PLAT OF SAID LINE IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, JULY 6, 1882; AND THE PATENT SUBSEQUENTLY ISSUED TO MARIA AMACKER WAS ISSUED FOR LAND ALREADY DISPOSED OF, AND IS VOID.

The grant to defendant in error by act of July 2, 1864, is a grant *in praesenti*; that is, it passes a present title to certain odd numbered sections. What sections are granted can not be ascertained until the line of the road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office. Previous to that time the grant is a float, but immediately upon the occurence of that event, the title to the odd-numbered sections of non-mineral public land, to which the United States has, at that time, full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, vests in the grantee as of the date of the grant.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 5.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 247.

U. S. v. *S P. R. R. Co.*, 146 U. S. 593.

Wis. Cent. R. R. Co. v. *Price Co.*, 133 U. S. 507-9

After the cancellation of McLean's entry in September, 1879, and until after July 6, 1882, there was no attempt to initiate any claims or rights to this land; and as the act of June 15, 1880, did not operate *proprio vigore* to attach a claim or right thereto, it was, July 6, 1882, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights. And when on that day the railroad company fixed the line of the road opposite thereto, and within forty miles thereof, and filed a plat of such line in the office of the commissioner of the general land office, it *eo instanti* acquired the title to this land, subject only to a forfeiture for breach of the conditions subsequent; a contingency removed by the railroad company's compliance with those conditions. * The title thus acquired is the legal title, as distinguished from the equitable title, and is sufficient to sustain an action in ejectment.

N. P. R. R. Co. v. *Amacker*, 1 C. C. A. 349, 353.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 247, *et seq.*

The title having passed from the United States prior to the time Maria McLean applied to purchase the land, the interior department was without jurisdiction, and had no authority either to accept her money or to do any act in the prem-

* Record, 24, 39.

ises. And the patent issued being for land, the title to which had already passed from the government, was and is void. It did not operate to convey the title to the plaintiff in error, for the government had no title to convey. This fact may be shown in an act on of ejectment equally as in an action in equity; and being established, the patent is no bar to a recovery by the holder of the true title.

N. P. R. R. Co. v. *Amacker*, 1 C. C. A. 353.
N. P. R. R. Co. v. *Cannon*, 46 Fed. Rep. 238.
Wright v. *Roseberry*, 121 U. S. 518, *et seq.*
Iron Silver M. Co. v. *Campbell*, 135 U. S. 286, 292, *et seq.*
Doolan v. *Carr*, 125 U. S. 624, *et seq.*
Francoeur v. *Newhouse*, 40 Fed. Rep. 623.

Further, it may be noted that the patent was issued without authority of law, for the reason that the act of June 15, 1880, does not authorize the purchase of lands by the widow of the entryman.

Gallihcr v. *Cadwell*, 145 U. S. 371.

We submit that the judgment of the circuit court should be affirmed.

FRED M. DUDLEY,
Counsel for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARIA AMACKER, ET AL.,
Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILROAD CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

THOS. C. BACH,
AND MASSENA BULLARD,
Attorneys for Plaintiffs in Error.

C. K. WELLS CO., PRINTERS AND BINDERS, HELENA, MONT.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARIA AMACKER, ET AL.,
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NORTHERN PACIFIC RAILROAD CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

The points attempted to be made by defendant in error under point One of his argument, subdivision A, are:

1st. That the filing of the declaratory statement is not such a right as is contemplated in section one of the grant as a reservation from the grant.

2d. That the presumption was upon the defendant below to prove the right to file; and

3d. That the statement itself is not evidence of the citizenship of the pre-emption declarant.

As to first claim of defendant in error:

The position taken by counsel for defendant in error under this head, is practically that no pre-emption right is excluded from the grant, unless the claimant had actually proved up in the legal land office, and paid the purchase price,—in other words, not until the filing of the entry.

It is submitted that Congress meant something by the terms "pre-emption," "claims," and "rights." It meant to except something which, without that limitation, would have been included within the terms of the grant. It needed no words by Congress to exclude from the grant land included within a pre-emption entry, as defined by counsel for defendant in error, for the law itself would interpret a grant by the United States not to include any property to which the United States did not have a title, or which it had already conveyed to others, or which it was in duty, equity and conscience bound to convey to others. The pre-emption entry, as defined by counsel, is complete only when claimant has proved up, as it is called, and has paid the purchase price of the land to the legal agents of the United States. When that is done the Government has nothing left save the bare legal title, and holds that title subject to the equity of the pre-emption claimant. Whoever took the land from the Government would

take it with notice of that right subject to the same equity. To quote counsel himself, on pages 10 and 11:

"A valid pre-emption entry vests the entryman with an equitable title to the land entered, of which not even Congress can deprive him. The entry, whether made under the pre-emption, homestead, or other public land law, operates to segregate the land entered from the mass of public lands. It reserves and appropriates the land. Its allowance requires the exercise of *quasi* judicial functions on the part of the land officers; and, if the land be subject to entry, their decision, until reversed by their superior officers, and the entry cancelled, preserves the land from other disposition."

H. & D. R. R. Co. vs. Whitney, 132 U. S., 363-4.

It is quite apparent that it is not such a right that Congress in its wisdom found necessary to exclude from the grant to the defendant in error. A pre-emption right or claim is not a pre-emption entry; it is the right to make an entry, or right to prove up or right to purchase. In some of the cases cited, and in our opinion quite properly, it is treated as nothing more nor less than a contract which is of quite common occurrence among private individuals. It is an option given, it is true, by the Government to an individual, and which may be recalled by the Government at any time before actual proof and payment—a right which the Government could have revoked—a right which would have lapsed had the Government seen fit to include the lands covered thereby in the grant itself, as it did in the cases cited by counsel known as the Yosemite cases, and also the case of Frisby vs. Whit-

ney. All of the cases cited by counsel are cases which come under either such facts as existed in the Yosemite cases, and of course are not applicable here.

See Shepley vs. Cowan, 91 U. S., 330, or they come under the rule as laid down in the case of Bohall vs. Dilla, 114 U. S., 47, where there is a conflict between two pre-emption claimants, the first claimant not having proved-up in time, thus making the land, by the terms of the pre-emption law itself, "subject to the entry of any other purchaser." That the claim or right of Scott was such as would not be included within the grant, we think is abundantly shown in Shepley vs. Cowan. See also Whitney vs. Taylor, 45 Fed. Rep. 616, and counsel himself seems unable to escape that conclusion. On page 22 he quotes from 112 U. S., and other cases which, to us, certainly drew a distinction between an entry and a pre-emption right. It is impossible to read his citations without reaching the conclusion that the pre-emption right is not an entry: it is something that proceeds the entry, in fact it is that without which there could be no entry; a right to a thing is certainly not the thing itself.

The next point which counsel makes under this heading is that it must be shown that Scott was at least possessed of the legal qualifications of a settler or claimant, that the burden of proof is upon us to show that the land was not included within the grant, and that the declaratory statement is not sufficient to prove that Scott was a citizen of the United States. As to the question upon whom the burden of proof would be, again we differ with counsel. It is quite common to look upon land covered by claims, as being within the

general theory of the exception or reservation of the grant. But the law itself did not create the exception; it merely granted to the Railroad Company lands of a certain description. It does not grant to the Railroad Company a large body of land "excepting and reserving from the grant such possession of the land as may be subject, etc." The distinction is quite clear. Lands which were conveyed to the company are lands belonging to the United States at the time of the grant, and to which no other rights have attached. That is not an exception or reservation from the grant, when strictly speaking, although in common parlance, and where the question of proof is not involved it amounts to practically the same thing. That counsel for defendant in error had a different opinion during the trial of the case, was quite apparent from the conduct of the case in the Court below, where he assured the plaintiff of believing that the land was free from all claims. It will be seen on pages 24, et seq., of the record, that he did assume this position.

Again referring to the record on page 27, the declaratory statement of Scott will be found in which Scott is described to be a native-born citizen of the United States. On the top of the same page Scott testifies that he is the Scott mentioned in that paper. The presumption of law is that a person within the United States is a citizen of the United States. [See Garfield M. & M. Co. vs. Hammer, 6 Mont., 53, and cases cited on page 60.]

Again, in our opening brief, we have cited cases which are conclusive as to the rule that the filing being of record in the proper office, uncancelled, is final, and that the policy of

the Government and of the law will not permit defendant in error to question the validity of that record at this time.

The points B and C are fully answered in our opening brief. Whether or not the burden of proof was upon us—whether or not we should have shown that Scott was a citizen of the United States—whether or not the findings may be sufficient to sustain the judgment, we respectfully submit that the Court erred in allowing, over our objection, witness Scott to testify that he ever abandoned the land; and for that error alone the case should be reversed. It is not probable that unless actual perjury is shown any case more than these cases will justify the language of the Court in the Railroad Company vs. Dunmeyer, and Railroad Company vs. Whitney, to the effect that it was not the policy of the Government to allow any controversy contradicting the records to be carried on between a corporation on the one side and settlers on the other. Scott testified that he left the land in the fall of '69 and never returned to it, and in the opinion of the Court it will be found that he further testified that he removed to the town of Helena and then went to Butte, and yet on page 32 of the record we find that he amended his filing on Oct. 20th, 1869. After the filing of the map of the general route he again amended his filing on Oct. 14th, '72. We submit that the record is such a contradiction of his testimony as will strongly justify the position taken by the Supreme Court of the United States in cases last cited.

Upon the question of burden of proof we again submit that the theory of the cases, Railroad Company vs. Whitney and Railroad Company vs. Dunmeyer and the other cases

cited on pages 18 and 19 of our former brief are conclusive, the filings being of record in the land office uncancelled. See finding 10, page 40 of the record, that the land is not included within that grant, and that the company cannot dispute the record. If the contention of the defendant in error that we must show that the land is excepted from the grant, and that we must prove citizenship settlement and occupation, is correct, then it would seem that the proper course for the company to pursue would be to remain silent, until, by lapse of time or dispersion of witness, it would be impossible to show these facts. Moreover, and this applies to the question of settlement—the good faith of McLean, raised subsequently in the brief of the defendant in error—it appears from the record, in the findings, that this whole matter was contested in the land office. and although the rule is that the question of law decided by the land department is not controlling on the Courts, nevertheless the facts found, and necessary to be found, and which are also subject to review in the land department, are final. See cases cited. page 26. in our brief.

Upon the remaining question in the brief of the defendant in error. we are content to rest upon the brief already filed.

Respectfully submitted.

THOS. C. BACH,
AND MASSENA BULLARD,
Attorneys for Plaintiffs in Error.

No. 99.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

CORA E. NIXON,

Defendant in Error.

Error to the Circuit Court of the United States, for District of Washington, Western Division.

J. H. BRODIE & CO., PRINTERS, 401-403 SANSOME ST., S. F.

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In the Circuit Court of the United States, for the District of Washington, Western Division.

Judgment Roll, No. 127.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Defendant.

In the Circuit Court of the United States, for the District of Washington, Western Division.
July Term, 1892.

Be It Remembered:

That on the 11th day of February, 1892, there was duly filed in the said Circuit Court of the United States for the District of Washington, Western Division, a Complaint, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western District of Washington, Holding Terms at Tacoma.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Defendant.

The plaintiff herein for her cause of action alleges:

I.

That at all times mentioned in this complaint she was and is a resident and citizen of the State of Washington.

II.

That heretofore, on the 1st day of September, 1889, and at all times, the defendant was a citizen of the State of California, being then and there a corporation, duly organized and incorporated by the said State of California under the laws thereof, and at all times mentioned in this complaint was doing business in the State of Washington, with an office at Tacoma, in said State. That on the said 1st day of September, 1889, one Thomas Lee Nixon was the husband of the plaintiff herein, and was such until his death. That on said first day of September, 1889, the defendant and said Thomas Lee Nixon entered into a certain mutual written agreement and contract, commonly known and called a life insurance policy, by the terms of which said policy the defendant then and there agreed and undertook in consideration of the sum of five hundred and seventeen eighty one-hundredths dollars, which was then and there duly paid by said Thomas Lee Nixon to insure his life for the term of twenty years, and in the event of his death to pay this plaintiff, the wife of said Thomas Lee Nixon, the sum of ten thousand dollars.

III.

That on the said 1st day of September, 1889, said Thomas Lee Nixon paid in cash to said defendant the sum of five hundred seventeen eighty one-hundredths dollars in full of the premium so agreed to be paid, and

said policy was then and there delivered in the City of Tacoma, Washington, to the said Thomas Lee Nixon.

IV.

That on the 31st day of October, 1890, this plaintiff, then the wife and now the widow of said Thomas Lee Nixon, upon the special written instance and request of the defendant and its agents, paid the second annual premium in cash, to-wit: the sum of five hundred and seventeen eighty one-hundredths dollars, which payment was duly received by defendant and its agent, and duly receipted for in writing, a copy of which receipt is in words and figures following, to wit:

" $517.80. Portland, Oregon, Oct. 31, 1890.

Received of Ladd & Tilton, bankers, $517.80 for account of Thomas L. Nixon policy, as per telegraphic instructions from Merchant's National Bank, Tacoma. 10/ 31, 1890.

Edward C. Frost, Agent.

V.

That on the 31st day of October, 1890, the said Edward C. Frost, who signed said receipt and received said premium was the general agent of the defendant, residing at Portland, Oregon.

VI.

That on the 16th day of April, 1891, the said Thomas Lee Nixon died; of which fact due notice and proof was made upon defendant, and demand was then and there made for payment of the sum so agreed to be paid in said policy of insurance, and that this plaintiff was the sole

beneficiary under said policy, and was entitled to the said sum of ten thousand dollars, for which the life of said Thomas Lee Nixon was insured.

VII.

But this plaintiff alleges that notwithstanding the express written agreement, stipulation and promises so made by the defendant, in said policy of insurance, to insure the life of said Thomas Lee Nixon, and to pay upon proof of his death said sum to this plaintiff said defendant, though often requested so to do, has refused and still refuses to pay said sum to the plaintiff.

VIII.

And the plaintiff further alleges that all the terms and conditions of said contract of insurance have been fully complied with, as she is advised, and that any breach of said contraat, if any, has been made and caused by the wrongful acts of defendant and his agents.

IX.

Wherefore, plaintiff prays for judgment for the sum of ten thousand dollars, and the pro rata amount of the last premium paid upon said policy and for interest and costs.

PALMER & PALMER,
CARROLL & CARROLL,
Att'ys for Plaintiff.

STATE OF WASHINGTON, }
County of Pierce. } ss.

I, Cora E. Nixon, do solemnly swear that I am the plaintiff in the above entitled action, and that the statements in the foregoing complaint are true as I verily believe.

CORA E. NIXON.

Subscribed and sworn to before me, this 11th day of Dec., 1891.

[Seal.] Frank S. Carroll, Notary Public,
Residing at Tacoma, Wash.

Endorsement:

Filed this 11th day of February, A. D. 1892.

A. Reeves Ayres,
Clerk.

And afterwards, to-wit: on the 21st day of March, 1892, there was duly filed in said Court in said cause, an answer to the complaint in the words and figures as follows, to-wit:

In the United States Circuit Court, Ninth Judicial Circuit for the District of Washington, Western Division.

Cora E. Nixon,
Plaintiff,
vs.
The Pacific Mutual Life Insurance Company of California (a corporation),
Defendant.
No. 127.

Now comes the above named defendant, and answering unto the complaint of plaintiff filed herein, admits, denies, avers and alleges as follows:

1. Admits that on the first day of September, 1889, and at all times since then, this defendant was a citizen of the State of California, a corporation organized and existing under the laws of the State of California, and avers that its true corporate name is the Pacific Mutual Life Insurance Company of California;

Alleges that its home office and principal office and place of business was and is at the City and County of San Francisco, in the State of California;

Admits that at and during all said time it has been and is doing business in the State of Washington, with an agency and agency office at Tacoma in said State.

2. Admits that on the first day of September, 1889, one Thomas Lee Nixon was the husband of the plaintiff in this cause, and continued to be such until the date of his death.

3. Admits that on said first day of September, 1889, this defendant and the said Thomas Lee Nixon entered into a certain mutual agreement and contract commonly known and called a life insurance policy; but

4. Denies that the terms of said policy and contract, or policy or contract are correctly or fully stated or set out in the complaint filed herein, or that the true or full consideration for said policy of insurance is set out or stated in the said complaint.

5. Alleges that the said written contract of insurance was in two parts, one of which is commonly known as and called an "application for life insurance," and which consisted of an instrument having on the face thereof divers questions propounded on behalf this defendant to the said Thomas Lee Nixon, with his answers thereto written thereon, and also of divers agreements, covenants and warranties made by and on the part of said Thomas Lee Nixon, which said instrument was dated at Tacoma on the 15th day of August, 1889, and was signed by the said Thomas Lee Nixon, and constituted and became and was by the terms thereof and of the other part of said

contract, to-wit: the policy, a part of the contract of insurance between the said Thomas Lee Nixon and this defendant.

6. Avers that among the questions so propounded to and answered by the said Thomas Lee Nixon was the following:

"Do you understand and agree that only the officers "at the home office have authority to determine whether "or not a policy shall issue on any application, and that "they act only on the statements and representations in "the application, and that no statements, representations "or information made or given by or to the person solicit- "ing or taking this application for a policy, or to any "other person, shall be binding on the Company, or in "any manner affect the rights, unless such statements, "representations or information be reduced to writing, "and presented to the officers of the Company at the home office in this application?" To which question the said Thomas Lee Nixon answered "Yes."

Avers that among the covenants, agreements and warranties contained in the said instrument and signed by the said Thomas Lee Nixon was the following, to-wit:

"It is hereby declared and warranted that all the "statements and answers made in this application, "including the answers to questions to be asked by agent "and the questions to be asked by the Medical Examiner "are complete and true, and that they, together with "this declaratian and agreement, constitute an appli- "cation to the Pacific Mutual Life Insurance Company "of California, for a policy of insurance, and are offered "as a consideration for the policy hereby applied for."

"And it is agreed that there shall be no contract of "insurance until a policy shall have been issued and "delivered by the said company and the first premium "thereon paid while the person proposed for insurance is "living, and in the same condition of health described "in this application; and that if said policy be issued, "the declarations, agreements and warranties herein con- "tained shall constitute a part of the contract, and the "contract of insurance when made, shall be held and "construed at all times and places to have been made in "the City of San Francisco, in the State of California."

Also the following: "It is agreed that the policy "issued upon this application shall become null and void "if the premium thereon is not paid as provided therein; "and should such policy become null and void by reason "of the non-payment of premium, all payments previously "made shall be forfeited to the Company, except as "therein otherwise provided."

Which application, containing the question and the covenants, agreements and warranties hereinbefore quoted, was duly signed by the said Thomas Lee Nixon, and by him delivered to this defendant as a part of the said contract of insurance, and in consideration thereof, and as an inducement to this defendant to issue its policy upon his life; which application so signed, executed and delivered to this defendant, this defendant is ready and willing and now offers to produce as this Court shall direct.

7. Alleges that afterwards and on the first day of September, 1889, this defendant did, "in consideration "of the representations made" in the application there- "for, and of the agreements therein contained, which

" application is made a part of this contract, and of the " sum of five hundred and seventeen dollars and 80 cents, " and of the annual payment of a like amount to be paid " on or before twelve o'clock noon of the first day of " September in every year during the continuance of this " policy," insure the life of Thomas Lee Nixon for the sum of ten thousand ($10,000.00) dollars for the period of twenty years, and did promise and ageee " to pay the " amount of the said insurance at its office in the City of " San Francisco, to Thomas Lee Nixon or assigns, on the " first day of September, 1909, or should the person " whose life is hereby insured, die previous to the date " last mentioned, leaving this policy unassigned, the said " amount shall be payable upon due notice and satis- " factory proof of the death of said insured, to Cora E. " Nixon, wife of said Thomas Lee Nixon," the plaintiff in this cause.

8. Defendant further alleges that in and by the said policy and printed on the face thereof, it was further provided "that after the payment of the first premium " thereon, a grace of thirty days for the payment of " premium shall be allowed, but only in case the same is " paid during the lifetime of the insured aforesaid ;" and in and by the said policy of insurance and printed on the face thereof, it was further provided "that no alteration " or waiver of the conditions of this policy shall be valid " unless made in writing at the office of said Company " in San Francisco, and signed by the President, or " Vice-President and Secretary or Assistant Secretary."

Which policy of insurance constituted the second part to the mutual contract so made by and between this

defendant and the said Thomas Lee Nixon, and was by this defendant delivered to the said Thomas Lee Nixon, and was, and is, as this defendant is informed and believes now in the possession of the plaintiff in this cause; and this defendant demands that upon the trial of this cause, the same shall be produced for the examination and inspection of this Court as the Court shall direct.

9. Admits that upon the delivery of said policy of insurance, the first premium therein mentioned, to-wit: The sum of $517.80 was duly paid by the said Thomas Lee Nixon.

10. Denies that all the terms and conditions of said contract of insurance have been fully complied with by the said Thomas Lee Nixon, and denies that any breach of said contract has been made or caused by the act or acts of this defendant or its agents.

11. Alleges that the second annual premium falling due under said policy, to-wit: The premium falling due on the first day of September, 1890, was never paid, nor was any part thereof ever paid, neither on the said first day of September, 1890, or at any other time, nor was the same tendered at any time within thirty days next after the said first day of September, 1890, as in the said policy provided; by reason whereof the said policy became and was, and ever since the thirtieth day of September, 1890, has been null and void.

12. Denies that the payment alleged to have been made on the 31st day of October, 1890, was made at the special written instance and request, or at the instance and request of this defendant or its agents, or that the same was ever accepted or received by this defendant

or by any agent of this defendant, as payment of the premium aforesaid: on the contrary this defendant ALLEGES the truth and the fact to be that the said policy of insurance was at that time and ever since the 30th day of September next prior to that time has been null and void; but, under the rules and practice of this defendant in the conduct of its business of insurance, it was the custom of this company to permit an insured whose policy had been forfeited for non-payment of premium to have the same restored at any time within sixty days after such forfeiture upon a written application for such restoration, accompanied with a certificate from an examining physician showing that the applicant was still in good health, and upon payment of premium then past due; that the agent of this defendant had advised the said Thomas Lee Nixon of this custom, and informed him that his policy might be restored upon such written application, with certificate of health and payment of premium, and suggested to him that he make such application and furnish a certificate of examination and of good health, and deposit the same with him, the agent, when he, the agent, would forward such application and certificate to the home office for its action; but that he, the agent, had no power or authority to restore said policy under any circumstances or to apply any money that might be received by him after the 30th day of September, 1890, to the payment of premium upon said policy; that the said sum of $517.80, so received by Edward C. Frost, the agent of the defendant at Portland, Oregon, from Ladd & Tilton, Bankers, on the 31st day of October,

1890, as shown by the receipt (a purported copy of which is set out in the said complaint) was not received by said agent in payment of said premium, and the said agent had no power or authority to receive the same in payment of said premium, but it was simply received by him to be applied in payment thereof in case said policy should be restored; and he, the said agent, immediately notified the plaintiff herein of such fact, and that it would be necessary to forward to the home office an application for restoration of the policy, together with a certificate of examination and good health, in order to secure such restoration; otherwise, that the money would be held in trust for her and subject to her order.

Alleges that neither the plaintiff nor the said Thomas Lee Nixon ever forwarded to the home office or to the said agent, or delivered to them or either of them, any application for restoration of said policy, or any certificate of examination or of good health, or ever took any steps to secure the restoration of said policy, and that no restoration thereof was ever made, or any premium receipt for the money so deposited with said agent ever given; but that the money so paid to said Frost was always held by him as the money of said plaintiff and subject to her order, and that she was, by the said Frost, so fully informed and advised long before the death of said Thomas Lee Nixon, and has since been and now is so informed and advised.

13. Admits that the said Thomas Lee Nixon died on the 16th day of April, 1891, but denies that the said plaintiff then became or was or at any time since has

been, or now is entitled to the said sum of ten thousand dollars, or any other sum, of or from this defendant for or on account of said policy of insurance aforesaid.

14. Admits that this defendant has refused and still refuses to pay the said sum or any sum to the plaintiff, and denies that the plaintiff is entitled to have or recover any sum of money whatever from this defendant.

Of all which the defendant prays judgment that it be hence dismissed with its costs.

DOOLITTLE & FOGG,
Attorneys for Defendant.

CHARLES N. FOX, of Counsel.

State of California, }
City and County of San Francisco. } ss.

I, George A. Moore, do solemnly swear that I am the President of the Pacific Mutual Life Insurance Company of California, the above named corporate defendant, and that the statements in the foregoing answer contained are true as I verily believe.

GEO. A. MOORE.

Subscribed and sworn to before me this 9th day of March, 1892.

(Seal) Thomas E. Hawen,
Notary Public.

And, afterwards, to-wit; on the 9th day of September, 1892, there was duly filed in said Court in said cause a reply to defendant's answer to the complaint in the words and figures as follows, to-wit:

In the Circuit Court of the United States, for the State of Washington, Western Division, Holding Terms at Tacoma.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Defendant.
} Reply.

Comes the plaintiff, and saving and reserving to herself all matter of exceptions to the errors, uncertainties and insufficiencies of defendant's answer herein, for replication unto said answer, alleges :—

I.

That she denies each and every allegation in said defendant's answer, not herein or in the complaint herein expressly admitted.

II.

She admits that she has in her possession the original contract for life insurance sued on, but disclaims any knowledge of any collateral agreement, stipulation or contract, which is alleged to be part of said contract of life insurance.

III.

She denies having any knowledge or information sufficient to form a belief as to the rules and customs of said defendant, alleged in Paragraph XII of said answer.

IV.

She denies that the receipt pleaded in her complaint

shows upon its face that it was not received in full payment of the premium due, and denies that it was received in trust for the benefit of this plaintiff by the said agent, Frost, as alleged in said XII paragraph of said complaint; but she alleges the truth to be that said agent, Frost, has repeatedly refused to return or account to this plaintiff for said sum of $517.80 paid to agent Frost, as alleged in her complaint, and she moreover alleges that at all times said agent Frost has acted and represented said defendant as its agent and not otherwise.

Wherefore, plaintiff prays judgment as originally claimed in her said complaint.

CARROLL & PALMER,
Attorneys for Pltf.

State of Washington, } ss.
County of Pierce. }

I, Cora E. Nixon, having read the statements herein contained, do solemnly swear that the same are true as I verily believe.

CORA E. NIXON.

Subscribed and sworn to before me, this 3d day of Sept. A. D. 1892.

[Seal.] Geo. L. Palmer,
Notary Public residing at Tacoma,
Pierce County, Washington.

And afterwards, to-wit: on Tuesday, the 13th day of September, 1892, the same being the sixteenth judicial day of the regular July term of said Court, present the Honorable Cornelius H. Hanford, United States District

Judge, presiding, the following proceedings were had in said cause, to-wit:

United States Circuit Court, District of Washington, Western Division. July Term.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Now, on this day, on the application of plaintiff's attorney, leave is given plaintiff to file an amended bill of complaint herein, and time was given the defendant until September 24th to file its answer thereto.

Dated September 13, 1892.

And afterwards, to-wit: on the 15th day of September, 1892, there was duly filed in said Court in said cause an amended complaint in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Defendant.
Complaint.

Now comes the plaintiff, and by leave of Court, files

her amended complaint herein, and for cause of action against the defendant, says:

I.

That on the 1st day of September, 1889, and for a long time prior thereto, she was, ever since has been, and still is a citizen of the State of Washington, residing in the City of Tacoma, in the County of Pierce, in said State.

II.

That on said 1st day of September, 1889, and for a long time prior thereto, the defendant, the Pacific Mutual Life Insurance Company of California, was, ever since has been, and still is a citizen of the State of California it being then and there a corporation duly organized, incorporated and existing under and by virtue of the laws of said State of California, and having its principal place of business in the City of San Francisco, in said State, and during all of said time legally authorized to do, and doing business in the State of Washington as a life insurance company, engaged in the business of life insurance.

III.

That on said first day of September, 1889, and for a long time prior thereto, and since said time until the date of his death, one Thomas Lee Nixon was the lawful husband of this plaintiff.

IV.

That on said first day of September, 1889, the defendant and said Thomas Lee Nixon entered into a contract in writing, wherein and whereby the said defendant promised, agreed and bound itself in consideration of the

representations made to it by said Thomas Lee Nixon in his application to said defendant therefor, and the payment by said Thomas Lee Nixon to said defendant of the sum of five hundred and seventeen and eighty-hundredths ($517.80) dollars on said first day of September, 1889, and of the annual payment of a like amount on or before twelve o'clock noon of the first day of September in every year during the continuance of said contract, to insure, and by the express terms of said contract, the defendant did insure the life of said Thomas Lea Nixon, in the full sum and amount of ten thousand dollars for the term of twenty years from said date. And in and by the terms of said contract and for said consideration, said defendant promised and agreed to pay the amount of said insurance, to-wit: Said sum of ten thousand dollars, at its office in the City of San Francisco, to said Thomas Lea Nixon or his assigns, on the first day of September, 1909, or if said Thomas Lea Nixon should die previous to said last mentioned date, leaving said policy of insurance unassigned, then in that event, said defendant promised, upon due notice and satisfactory proof of the death of said Thomas Lea Nixon, to pay the amount of said insurance, to-wit: Ten thousand dollars to Cora E. Nixon, wife of said Thomas Lea Nixon, this plaintiff.

V.

That said Thomas Lea Nixon, on said ffrst day of September, 1889, paid to said defendant the first premium due upon said contract of insurance, to-wit: The sum of five hundred and seventeen and 80–100 dollars, and said defendant accepted the same and duly issued its

policy of insurance, insuring the life of said Thomas Lea Nixon in the sum of ten thousand dollars, payable as aforesaid, and delivered said policy to said Thomas Lea Nixon.

That thereafter, and until the time of his death, said Thomas Lea Nixon faithfully kept and performed all of the conditions in said contract to be kept and performed by him.

VI.

That on the 16th day of April, 1891, and while said policy of insurance was in full force, said Thomas Lea Nixon departed this life without having assigned or disposed of said policy of insurance, leaving this plaintiff surviving him, as his widow and sole beneficiary under said policy of insurance, of all of which the said defendant has had due notice and full knowledge.

VII.

That upon the death of said Thomas Lea Nixon and within a reasonable time thereafter, this plaintiff, as the widow of said Thomas Lea Nixon and sole beneficiary under said policy of insurance, and after said defendant had due notice and full knowledge of the death of said insured, demanded of the defendant the payment to her of said sum of ten thousand dollars, as provided in said policy, but to pay the same or any part thereof, the defendant then refused and still doth refuse.

Wherefore, plaintiff prays judgment against said defendant for said sum of ten thousand dollars, with interest thereon at the rate of ten per cent per annum

from the 16th day of April, 1891, and for the reasonable costs and disbursements herein.

P. H. PALMER,
THOS. CARROLL, and
RELFE & BRINKER,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss.
County of Pierce. }

Cora E. Nixon, being first duly sworn, on oath deposes and says, that she is the plaintiff named in the foregoing complaint; that she has read said complaint, knows the contents thereof, and believes the same to be true.

CORA E. NIXON.

Subscribed and sworn to before me this 14th day of September, 1892.

(Notarial Seal.) THOS. CARROLL,
Notary Public in and for the State of Washington, residing at Tacoma.

And afterwards, to-wit: On the 24th day of Sept., 1892, there was duly filed in said Court in said cause, an answer to the amended complaint in the words and figures as follows, to-wit:

In the United States Circuit Court, Ninth Judicial Circuit for the District of Washington, Western Division.

CORA E. NIXON, *Plaintiff,*
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, (a corporation), *Defendant.* } No. 127.

Now comes the above named defendant and answering

unto the amended complaint, filed herein, admits, denies, avers and alleges, as follows:

1. Admits that on the first day of September, 1889, and at all times since then, this defendant was a citizen of the State of California a corporation organized and existing under the laws of the State of California, and avers that its true corporate name is The Pacific Mutual Life Insurance Company of California.

Alleges that its home office and principal office and place of business, was, and is at the City and County of San Francisco, in the State of California.

Admits that at and during all of said time, it has been and is doing business in the State of Washington, with an agency and agency office at Tacoma, in said State.

2. Admits that on the first day of September, 1889, one Thomas Lea Nixon was the husband of the plaintiff in this cause, and continued to be such until the day of his death.

3. Admits that on said first day of September, 1889, this defendant and the said Thomas Lea Nixon entered into a certain contract in writing, which is commonly known and called a life insurance policy; but

4. Denies that the terms of said policy and contract or policy or contract are correctly or fully stated or set out in the amended complaint filed herein, or that the true or full consideration for said policy of insurance is set out or stated in the said amended complaint.

5. Alleges that the said written contract of insurance was in two parts one of which is commonly known as and called an "application for life insurance," and

which consisted of an instrument] having on the face thereof diverse questions propounded on behalf of this defendant to the said Thomas Lea Nixon with his answers thereto written thereon, and also of diverse agreements, covenants and warranties made by and on the part of said Thomas Lea Nixon, which said instrument was dated at Tacoma on the 15th day of August, 1889, and was signed by the said Thomas Lea Nixon; and constituted and became, and was by the terms thereof and of the other part of said contract, to-wit: the policy a part of the contract of insurance between the said Thomas Lea Nixon and this defendant.

6. Avers that among the questions so propounded to and answered by the said Thomas Lea Nixon was the following:

"Do you understand and agree that only the officers "at the Home Office have authority to determine "whether or not a policy shall issue on any application, "and that they act only on the statements and repre- "sentations in the application, and that no statements, "representations or information made or given by or to "the person soliciting or taking the application for a pol- "icy, or to any other person, shall be binding on the com- "pany, or in any manner affects its rights, unless such "statements, representations or information be reduced "to writing, and presented to the officers of the company "at the home office in this application," to which question the said Thomas Lea Nixon answered "yes."

Avers that among the covenants, agreements and warranties contained in the said instrument and signed by the said Thomas Lea Nixon was the following, to-wit:

"It is hereby declared and warranted that all the "statements and answers made in this application, in- "cluding the answers to questions to be asked by agent "and the questions to be asked by the medical examiner, "are complete and true and that they, together with this "declaration and agreement, constitute an application to "the Pacific Mutual Life Insurance Company of Cali- "fornia, for a policy of insurance, and are offered as a "consideration for the policy hereby applied for. And "it is agreed that there shall be no contract of insurance "until a policy shall have been issued and delivered by "the said company, and the first premium thereon paid "while the person proposed for insurance is living and in "the same condition of health described in this applica- "tion; and that if said policy be issued, the declarations, "agreements and warranties herein contained shall con- "stitute a part of the contract, and the contract of in- "surance when made, shall be held and constituted at all "times and places to have been made in the City of San "Francisco, in the State of California."

Also the following: "It is agreed that the policy is- "sued upon this application shall become null and void if "the premium thereon is not paid as provided therein, "and should such policy become null and void by reason "of the non-payment of premium, all payments pre- "viously made shall be forfeited to the company, except "as therein otherwise provided."

Which application, containing the question and the covenants, agreements and warranties hereinbefore quoted, was duly signed by the said Thomas Lea Nixon, and by him delivered to this defendant as a part of the

said contract of insurance, and in consideration thereof, and as inducement to this defendant to issue the policy of insurance upon his life, which application, so signed, executed and delivered to this defendant, this defendant is ready and willing and now offers to produce as this Court shall direct.

7. Alleges that afterwards and on the first day of September, 1889, this defendant did, "in consideration of the representations made x x" in the application therefor, and of the agreements therein contained, which "application is made a part of this contract, and of the "sum of five hundred and seventeen dollars and 80 cents, "and of the annual payment of a like amount, to be paid "on or before twelve o'clock noon of the first day of "September in every year during the continuance of this "policy," insure the life of Thomas Lea Nixon for the sum of ten thousand ($10,000) dollars for the period of twenty years, and did promise and agree "to pay the "amount of the said insurance at its office in the City of "San Francisco to Thomas Lea Nixon or assigns on the "first day of September, 1909; or should the person whose "life is hereby insured die previous to the date last men-"tioned, leaving this policy unassigned, the said amount "shall be payable, upon due notice and satisfactory proof "of the death of said insured, to Cora E. Nixon, wife of "said Thomas Lea Nixon," the plaintiff in this cause.

8. Defendant further alleges that in and by the said policy and printed on the face thereof, it was further provided "that after the payment of the first premium "thereon a grace of thirty days for the payment of pre-"mium shall be allowed, but only in case the same is

" paid during the lifetime of the insured aforesaid;" and in and by the said policy of insurance and printed on the face thereof it was further provided " that no alteration " or waiver of the conditions of this policy shall be valid " unless made in writing at the office of said company in " San Francisco, and signed by the President or Vice- " President and Secretary or Assistant Secretary."

Which policy of insurance constituted the second part to the contract so made by and between this defendant and the said Thomas Lea Nixon, and was by this defendant delivered to the said Thomas Lea Nixon, and was and is, as this defendant is informed and believes, now in the possession of the plaintiff in this cause; and this defendant demands that, upon the trial of this cause, the same shall be produced for the examination and inspection of this Court as the Court shall direct.

9. Admits that upon the delivery of said policy of insurance the first premium therein mentioned, to-wit: the sum of $517.80, was duly paid by the said Thomas Lea Nixon.

10. Denies that all the terms and conditions of said contract of insurance have been fully complied with by the said Thomas Lea Nixon.

11. Alleges that the second annual premium falling due under this policy, to-wit: the premium falling due on the first day of September, 1890, was never paid, nor was any part thereof ever paid, either on the said first day of September, 1890, or at any other time, nor was the same tendered at any time within thirty days next after the said first day of September, 1890, as in the said policy

provided, by reason whereof the said policy became and was and ever since the thirtieth day of September, 1890, has been null and void.

12. Admits that the said Thomas Lea Nixon died on the 16th day of April, 1891, but denies that he died while the said policy was in force, and avers that by reason of the breach of said contract of insurance by and on the part of said Thomas Lea Nixon and the non-payment of said second annual premium the said policy was on, and long before the said 16th day of April, 1891, null and void; and denies that the said plaintiff then became, or was at any time since, has been or now is entitled to the said sum of ten thousand dollars, or any other sum, of or from this defendant for or on account of said policy of insurance aforesaid.

13. Admits that this defendant has refused and still refuses to pay the said sum or any sum to the plaintiff, and denies that the plaintiff is entitled to have or receive any money whatever from this defendant.

Of all which the defendant prays judgment that it be hence dismissed with its costs.

DOOLITTLE and FOGG,
Attorneys for Defendant.

CHAS. N. FOX, of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

I, Charles N. Fox, do solemnly swear that I am an elective officer, to-wit: one of the directors of the Pacific Mutual Life Insurance Company of California, the above

named corporate defendant, and that the statements in the foregoing answer contained are true as I verily believe; and that there is no other elective officer of said defendant in this State; that the facts of this case are as fully known to me as to any elective officer of said defendant, and that I make this verification for and on behalf of said defendant.

CHAS. N. FOX.

Subscribed and sworn to before me, this 21st day of September, A. D. 1892.

[Seal.] Charles S. Fogg,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

And afterwards, to wit: on the 27th day of September, 1892, there was duly filed in said Court in said cause a motion to strike out parts of the amended answer, in the words and figures as follows, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

Cora E. Nixon,
Plaintiff,
vs.
The Pacific Mutual Life Insurance Company of California,
Defendant.
No. 127.

Comes now the plaintiff in the above entitled cause by her attorney, and moves the Court to strike out and from the answer to the amended complaint, filed herein, all of paragraphs 5 and 6 thereof; for the reasons and upon the ground that all the matter contained in said para-

graphs is irrelevant, redundant, and immaterial to the issues in this case.

THOMAS CARROLL,
LEROY A. PALMER,
Attorneys for Plaintiff.

RELFE & BRINKER,
Of Counsel.

Rec'd copy hereof at one fifteen o'clock, Sept. 27th, 1892.

DOOLITTLF & FOGG,
Attys for Plff.

And afterwards, to-wit: on the 27th day of September, 1892, there was duly filed in said Court in said cause a reply to the amended answer in the words and figures as follows, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Defendant.

Reply.

Now comes the above named plaintiff, and for reply to the answer of defendant to the plaintiff's amended complaint, says:

I.

That she denies that within or at the period in said answer referred to, the said defendant had an office in

Tacoma or elsewhere in Pierce County in said State of Washington.

II.

She denies that the premium falling due on the 1st day of September, 1890, with thirty days grace, was never paid and that no part thereof was ever paid at any time or tendered, as in paragraph II, of said answer contained; and denies that said policy at any time ever became null and void.

III.

She denies that said policy was upon the 16th day of April, 1891, null and void, for the reasons or for any reasons alleged by defendant in paragraph 12 of its said answer.

Said plaintiff for further reply to the answer of defendant herein, says:—

I.

That the said defendant company by its duly authorized agents, at the expiration of the thirty days grace following the first day of September, 1890, duly and fully waived the payment of the second annual premium, as to the time when such payment should be made by the terms of the said policy, and all other conditions therein; and extended the time of the payment thereof, as hereinafter stated, and specially authorized and requested the said Thomas L. Nixon to pay said second premium during the month of October, 1890; and did on or about said date, notify and declare to said Nixon that if said premium should be paid at any time during said month of October, the same would be accepted by said company as if paid in accordance with the terms of said policy.

II.

That, in reliance upon and in pursuance of said request, extension and notification, the said Nixon, through this plaintiff thereupon immediately undertook to pay said second premium.

That defendant had no office or place of business in Pierce County, in which the insured then lived, and the local agent of defendant was then absent from said county and so remained absent till after said month of October.

That, after repeated efforts, being unable to find said agent or other person to whom said premium might be paid, up to the 31st day of October 1890, the same, to-wit: the sum of $517.80, was on said date forwarded and paid to said company through one Edward C. Frost, the general agent residing at Portland, Oregon, who was duly authorized to receive the same as such, and the same duly applied to the payment of said premium, and that said defendant has ever since then kept and retained said sum of $517.80 and does so now.

Wherefore, plaintiff says that defendant has waived all conditions in said policy with reference to the payment of said premium in any wise and all right or claim or forfeiture, if any it ever had, and is, and ought to be estopped from claiming any forfeiture under said policy.

For further reply plaintiff alleges:

I.

That the defendant company was duly incorporated under the laws of the State of California and on the first day of September 1889, and ever since has been doing

the business of life insurance under such authorization and in such corporated capacity.

II.

That heretofore, to-wit, on the——day of February, 1872, the Legislature of said State of California duly passed an Act entitled "An Act to regulate the forfeiture of policies of Life Insurance," which was duly approved, and took effect on February 2nd, 1872, and that the same now is and ever since has been in full force and constitutes a part of the contract of insurance set forth in plaintiff's amended complaint, which said Act was in the words following, to-wit:

Section 1. No policy of insurance on life hereafter issued by any company incorporated under the laws of this State shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to-wit: the net value of the policy when the premium becomes due and is not paid shall be ascertained according to the American experience life-table rate of mortality, with interest at four and a half per centum per annum, or the same interest which has been assumed in finding the net value of the policy after deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be cancelled. Four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of

the party at the time of the lapse of premium and the assumption of mortality and interest aforesaid.

Sec. 2. If the death of the party occurs within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of the premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proofs of death shall be submitted to the company within six months of the decease; and provided also that the company shall have the right to deduct from the amount insured in the policy the amount, at ten per centum per annum, of the premium that has been forborne at the time of the death.

Sec. 3. This act shall take effect immediately.

Wherefore, plaintiff having fully replied, prays judgment as in her amended complaint.

THOMAS CARROLL,
LEROY A. PALMER,
Attorneys for Plaintiff.

RELFE & BRINKER,
Of Counsel.

STATE OF WASHINGTON, }
County of Pierce. } ss.

Cora E. Nixon, being duly sworn on her oath, says that she is the plaintiff in the above entitled cause; that

she has read the foregoing reply, knows its contents, and believes the same to be true.

CORA E. NIXON.

Subscribed and sworn to before me this 27th day of September, 1892.

[Seal.] Geo. L. Palmer,

Notary Public within and for the State of Washington, residing at Tacoma, in said county.

And afterwards, to wit: on the 28th day of September, 1892, there was duly filed in said Court, in said cause, a motion to strike out parts of the reply, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

Cora E. Nixon,
Plaintiff,
vs.
The Pacific Mutual Life Insurance Company of California,
Defendant.

Motion.

Comes now the defendant and moves the Court to strike out of plaintiff s reply, filed herein, all that part thereof pleading or attempting to plead an alleged law of the State of California, for the reason that the same is not a proper part of said pleading, this Court taking judicial notice of the laws of the various States comprising the United States of America.

DOOLITTLE & FOGG,
Attorneys for Defendant.

And afterwards, to wit: on Tuesday, the 27th day of September, 1892, the same being the twenty-sixth judicial day of the regular July term of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

Twenty-sixth day.

TUESDAY, September 27, 1892.

Court met pursuant to adjournment, at 11 A. M., Hon. C. H. Hanford, U. S. District Judge on the Bench. Officers as of yesterday.

CORA E. NIXON, *Plaintiff*,

vs.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, *Defendant*.

Trial.

Now, on this day this cause came regularly on for trial, Messrs. Carroll, Palmer & Relfe appearing for the plaintiff, Messrs. Doolittle & Fogg and Charles N. Fox appearing for the defendant, and a jury being called and duly answered to their names and were sworn, to wit: B. E. Haney, A. T. Patrick, O. Olson, H. Jordan, J. L. Huckins, S. J. Teachnor, J. E. Robinson, C. R. Plumb, D. G. Newell, Simon Hirsch, Eugene McCorkle, Geo. W. Cyphert; and said cause thereupon duly proceeded by hearing the evidence until the hour of adjournment, when by consent the jury were admonished by the Court and were allowed to separate till the incoming of Court to-morrow morning.

And, afterwards, to-wit: On the 28th day of September, 1892, there was duly filed in said Court in said cause, the instructions asked by the defendant to be given to the jury, in the words and figures as, follows, to-wit:

In the United States Circuit Court, Ninth Judicial Circuit for the District of Washington, Western Division.

Cora E. Nixon,
Plaintiff,
vs.
The Pacific Mutual Life Insurance Company of California, (a corporation),
Defendant.
No. 127.

Instructions to Jury.

The defendant in this cause respectfully asks the Court to charge the jury as follows:

Given.

This is an action upon a contract of life insurance, and brought for the purpose of recovering the amount of the insurance named in the policy. The contract is in writing and upon its face shows that it is in two parts, to-wit: One part known as, and called Application for Life Insurance, and the other part being known as, and called a Policy of Life Insurance. There is no dispute in this cause as to the fact of a policy of life insurance having been issued and granted, insuring the life of Thomas Lea Nixon, in the sum of ten thousand dollars; nor is it disputed that said Thomas Lea Nixon died on the 16th day of April, 1891, and that his widow, the plaintiff in this cause, is entitled to recover the amount of the insurance,

provided the contract of insurance was in force at the date of his death.

Refused.

The application for insurance was written and signed in this State, and was made by said Thomas Lea Nixon, dated August 15th, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the 1st day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in San Francisco, in that State ; and the application provided upon its face that if the proposition for life insurance therein contained should be accepted and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted and the policy issued and made in San Francisco, in the State of California, and bore date September 1st, 1889, and by the terms of the contract itself became, and was a California contract, and the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California.

Given.

The contract further provides upon its face that if a policy should be issued upon the application, it should become null and void, if the premium thereon was not paid as provided therein, and should such policy become null and void by reason of the non-payment of the

premium, all payments previously made should be forfeited to the company, except as in the policy otherwise provided. This provision of the contract was, and is, expressly stated and declared in the first part thereof, to-wit: In the application made and signed by the insured, Thomas Lea Nixon.

Refused.

It was further provided in this application for insurance and became a part of the contract, that all the declarations, agreements and warranties therein contained should constitute a part of the contract, and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face, that it was made in consideration of the representations made in the application therefor, and the agreements therein contained, which application is made a part of the contract, and of said sum of five hundred seventeen and 80-100, and the annual payment of a like amount to be paid on or before twelve o'clock noon, on the first day of September in every year during the continuance of the policy.

Given.

It was further provided in and upon the face of said policy that after the payment of the first premium, a grace of thirty days for the payment of the premium should be allowed, but only in case the same is paid during the life time of the insured aforesaid; also, that no alteration or waiver of the conditions of the policy should be valid unless made at the office of said company in San Francisco, and signed by the President or Vice-President, Secretary or Assistant Secretary.

Refused.

It is admitted that the contract of insurance was duly made and executed, containing all of the provisions hereinbefore stated. That the first premium thereon, was paid and the policy delivered, and the only issue in this case is, as to whether or not the second premium which fell due on the first day of September, 1890, was paid according to the terms of the policy, of contract.

Refused.

If you should find from the evidence that it was so paid, and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy in that behalf on his part, then you will find for the plaintiff; but, on the other hand, if you find from the evidence that the premium which fell due on the first day of September, 1890, was not paid on or before twelve o'clock of that day, or within the thirty days grace, to-wit: The next succeeding thirty days thereafter, according to the terms of the policy, and within the lifetime of the insured, then it is your duty to find for the defendant.

Refused.

I charge you, that under the law of the contract, to-wit: the statutes and the laws of California, the provision made in this contract for prompt payment of the premium when due was a warranty that the premium should be so paid, and that a failure of this provision rendered the contract void under the statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it be-

came of the essence of the contract, and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract, and sickness or disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment.

Refused.

If there was a failure to pay this premium within the time fixed by the contract, it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid, would operate to renew the policy, even the act of a person holding an agency of this plaintiff, in receiving, receipting for and temporarily retaining the amount of the premium past due and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon.

DOOLITTLE & FOGG,
Attorneys for Defendant.

And afterwards, to-wit: an Wednesday, the 28th day of September, 1892, the same being the twenty-seventh judicial day of the regular July term of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Twenty-seventh Day.

WEDNESDAY, September 28th, 1892.

Court met pursuant to adjournment, at 10:30 A. M., Hon. C. H. Hanford, U. S. District Judge, on the bench, officers as of yesterday.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Defendant.

This cause again coming on regularly for hearing, the Jury being called duly answered to their names, and the cause thereupon duly proceeded by hearing the evidence and arguments of counsel till the close of the case, when the Jury being charged by the Court, retired to deliberate on their verdict.

Now, after due deliberation, the said Jury came into open Court, and being called, duly answered to their names and return the following verdict, to-wit:

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Defendant.

Verdict.

We, the jurors in the case of Cora E. Nixon, plaintiff, against the Pacific Mutual Life Insurance Company of

California, defendant, find for the plaintiff, and award her as principal and interest, the total sum of $10,991.75. *Ten thousand nine hundred and ninety-one dollar and seventy-five cents.*

Foreman,
B. E. Haney.

And thereupon in open Court counsel for the defendant gave notice of a motion for a new trial herein.

And, afterwards, to-wit: on Wednesday, the 29th day of September, 1892, the same being the twenty-eighth judicial day of the Regular July Term of said Court; present, the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

Cora E. Nixon,
Plaintiff,
vs.
The Pacific Mutual Life Insurance Company of California (a corporation),
Defendant.

Order.

And now, to-wit: on this 29th day of September, A. D. 1892, this cause came on for hearing on defendant's application for five days within which to file exceptions to the charge and instructions of the Court to the jury, and that all further proceedings in this cause be stayed for ten days, from September 28th, 1892, to enable defendant to prepare and file motion for new trial, and after due

consideration it is by the Court ordered that defendant be, and it is hereby granted five days from this date in which to file exceptions to the charge and instructions of the Court to the jury in this cause, and that all further proceedings in this cause be stayed for ten days from September 28th, 1892.

C. H. HANFORD,

Judge.

And, afterwards, to-wit; on the 3d day of October, 1892, there was duly filed in said Court in said cause, a stipulation in the words and figures as follows, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

CORA E. NIXON, *Plaintiff,*

vs.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, *Defendant.*

Stipulation.

It is hereby stipulated and agreed by and between the parties in the above entitled action that the defendant's exceptions to the charge of the Court, as well as the bill of exceptions prepared in form may be presented to and signed by the Judge at the time the motion for new trial in this cause is argued and determined by the Court, and the time limited by Rule Twenty-three of this Court within which said exceptions shall be taken and bill of exceptions filed is hereby waived and the time extended as above agreed upon, and also the time limited in the order of Court heretofore made extending the time, is

hereby extended until the hearing and decision upon the motion for new trial.

It is further stipulated and agreed that the time for presenting the bill of exceptions of the record herein, and the signing of the same is extended until the time of hearing and determination of the motion for new trial herein; provided, that said bill of exceptions ready for signing are served and filed herein within the ten days from the date of the rendition of the verdict in this cause, and that all proceedings in this cause shall be stayed until the hearing and determination of the said motion for new trial.

CARROLL, PALMER, BRINKER & RELFO,
Attorneys for Plaintiff.
DOOLITTLE & FOGG,
Attorneys for Defendant.

And afterwards, to wit: on Monday, the 3d day of October, 1892, the same being at Chambers of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

Cora E. Nixon,
Plaintiff,
vs.
The Pacific Mutual Life Insurance Company of California,
Defendant.

And now, to wit: on this 3d day of October, A. D.

1892, this cause came on for hearing upon the stipulation signed by the parties hereto, stipulating that the time for excepting to the charge of the Court to the jury, as well as the time for presenting and signing bill of exceptions to said charge and the time for presenting and signing bill of exceptions of the record in this cause, as well as all proceedings herein, be extended to the time of the hearing and decision upon the motion for new trial filed in this cause.

It is therefore ordered and adjudged, that the time for excepting to the charge of the Court and for presenting and signing bill of exceptions in form to said charge, as well as the time for presenting and signing bill of exceptions of the record in this cause be, and the same is hereby extended until the hearing and decision upon the motion for a new trial filed herein, and all proceedings in this cause are hereby stayed until a decision upon said motion for new trial. C. H. HANFORD, Judge.

And afterwards, to wit: on the 3d day of October, 1892, there was duly filed in said Court in said cause a motion for a new trial and an arrest of judgment, in the words and figures as follows, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,

vs.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a corporation),
Defendant.

Motion in Arrest of Judgment and for a New Trial.

Comes now the defendant herein, the Pacific Mutual Life Insurance Company of California, and moves the Court for an order vacating and setting aside the verdict, and that judgment be not thereon rendered, and for a new trial herein, upon the following grounds, to wit:

1.

On the ground of irregularities in the proceedings of the Court during the trial of said cause, by which the defendant was prevented from having a fair trial of said action.

2.

On the ground of irregularities in the conduct of the proceedings of the adverse party, which prevented the said defendant having a fair trial of said action.

3.

On the ground of misconduct of the jury during the trial of said action and finding said verdict, which prevented the said defendant having a fair trial of said action.

4.

On the ground that said verdict was given under the influence of passion and prejudice on the part of the jury, and thereby prevented this defendant having a fair trial of said action.

5.

On the ground that said verdict is not supported by the evidence in said cause.

6.

On the ground of the insufficiency of the evidence to justify the verdict in this action.

7.

On the ground that there was no evidence whatever to support said verdict.

8.

On the ground that said verdict is contrary to the evidence.

9.

On the ground that said verdict is contrary to law.

10.

On the ground that said verdict is contrary to the charge and instructions of the Court to the said jury.

11.

On the ground that the Court erred in the admission of evidence against defendant's objections and excluding evidence offered by defendant, all of which is fully shown by the record in this cause.

12.

On the ground that the Court erred in its instructions and charges to the jury.

13.

On the ground that the Court refused to give the requests to charge and each of them prayed for by defendant.

14.

On the ground that the Court erred in each of its sev-

eral instructions and charges to the jury, as is more fully shown by the exceptions of this defendant to said charge, as shown and embodied in defendant's exceptions and bill of exceptions to the charge of the Court to the jury in this cause, which exceptions and bill of exceptions were this day filed in this cause with the Clerk of this Court.

15.

That the Court erred in permitting plaintiff's counsel in his closing argument to the jury, to make statements outside of the record in this cause and not supported or warranted by the evidence in the case, and statements tending to arouse sympathy for the plaintiff and to create passion and prejudice in the minds of the jury against the defendant, a foreign corporation, whereby defendant was prevented from having a fair trial.

16.

This motion is made on the minutes of the Court, the notes of the evidence taken by the Judge and the short-hand reporter, and upon all of the evidence in the case and all rulings made and exceptions taken, and upon the pleadings and proceedings on file in the Clerk's office, and upon each of them, as well as upon the whole record in this cause.

DOOLITTLE & FOGG,
Attorneys for Defendant.

And, afterwards, to-wit: on the 3rd day of October, 1892, there was duly filed in said Court in said cause, the exception of the defendant to the charge of the Court, in the words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Washington, Western Division.

CORA E. NIXON,
Plaintiff.

vs.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, OF CALIFORNIA,
(a corporation,)
Defendant.

Exceptions and Bill of Exceptions to Charge of Court.

Be it remembered, that on the trial of the above-entitled cause at the close of the evidence and before the commencement of the argument of counsel to the jury, the defendant handed to the Court, nine requests to charge the jury on behalf of the defendant; said requests to charge be consecutively numbered from one (1) to nine (9) inclusive, which requests to charge were duly filed with the Clerk of this Court.

That the Court refused to give the second request to charge, as aforesaid, to which refusal and ruling the defendant at the time duly excepted and exception allowed by the Court.

That the Court refused to give the fourth request to charge, as aforesaid, to which refusal and ruling the defendant at the time duly excepted and exception duly allowed by the Court.

That the Court refused to give the sixth request to charge, as aforesaid, to which refusal and ruling the

defendant, at the time, duly excepted and exception allowed by the Court.

That the Court refused to give the seventh request to charge, as aforesaid, to which refusal and ruling the defendant, at the time, duly excepted and exception allowed by the Court.

That the Court refused to give the eighth request to charge, as aforesaid, to which refusal and ruling the defendant, at the time, duly excepted and exception allowed by the Court.

That the Court refused to give the ninth request to charge, as aforesaid, to which refusal and ruling the defendant, at the time, duly excepted and exception allowed by the Court.

Be it further remembered that after the argument of counsel to the jury, in this cause the Court thereupon orally, charged and instructed the jury touching the law in this case and among other things stated to the jury as follows, to-wit: "And the only issue in this case is, as to whether or not, the second premium which fell due on the first day of September, 1890, was paid."

And the Court further charged and instructed the jury, "She cannot hold this company liable upon any promise of an agent of the company to accept anything except actual cash for the full amount due, within the time stipulated in the contract, but under the issues as they are formed she must prove that she actually paid the money and that the company got it."

And the Court further instructed and charged the jury, that "under the terms of the contract and the law

of the case the time when the money was due is a material part of the contract which the company had a right to insist upon and no tender of payment or offer of payment after the lapse of the time would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted."

And thereupon the Court further instructed and charged the jury as follows: "But an actual payment of the money so that the full amount was received by the company when paid by the plaintiff in this cause is a payment of that premium; and if received and retained by the company would be exactly equivalent to payment within the period provided in the contract when it should have been paid. In other words a payment is as much a payment made after the date when it was due and payable, provided it was received and retained by the company, as if it had been made before that time. To which charge of the Court to the jury the defendant then and there duly excepted and exception allowed by the Court.

And thereupon the Court further charged and instructed the jury: "Now, Mr. Frost appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company will be regarded as the act of the company. Acts of his unauthorized and outside of the scope of his authority as an agent of the company, are not binding upon the company unless he assumed to act for the company, and the company knew of his action and received and retained the benefit of his action, and failed promptly to give notice to the plaintiff that his act was not indorsed or approved by the com-

pany." To which ruling the defendant then and there duly excepted, and exceptions allowed by the Court.

The Court thereupon further instructed and charged the jury: "If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to notify the plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received it, then it would be by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act, and may be regarded as the ratification of the action of an agent of the company in a matter in which he was previously unauthorized."

To which charge of the Court to the said jury the defendant then and there duly excepted and exception allowed by the Court.

Thereupon the Court further charged and instructed the said jury as follows: "If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If, however, being unauthorized, he simply retained the money temporarily, and promptly notified the plaintiff that it had not been applied in payment of the premium, the company would not be bound by his act in receiving the money. If, however, he retained the

money after being requested or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent for the plaintiff would be unwarranted, and, as far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect.

To which instruction and charge of the Court to the jury the defendant then and there duly excepted; and exception allowed by the Court.

And thereupon the Court further charged and instructed the jury as follows: " Under the peculiar conditions of this case it is one in which promptness and actual good faith was required on both sides:

It was required of Mr. Frost, if he did not intend to to apply the money he received in payment of this premium, to make the policy good, that he should give prompt notice. If he did give prompt notice, it was incumbent upon Mr. Nixon, or Mrs. Nixon to act definitely in the matter of furnishing the additional certificates that were required, or notify him that they could not or would not furnish them, and call for their money to be returned. If they did not notify Mr. Frost, and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was asking as trustee or agent of the plaintiff in holding the money, but it will be regard as money received and retained by the company, and bind them to make an application of it as a payment in accordance with the

original intention and instruction of the plaintiff in sending it."

To which instruction and charge of the Court, the defendant then and there duly excepted, and exception allowed by the Court.

And, thereupon, the Court further instructed and charged the jury, as follows: "Now, it is for you to take into account the testimony, the letters and correspondence, which have been introduced, and decide what effect to give to this evidence, and determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company declined to receive it as payment; and as you decide that question, you will make up your verdict for or against the plaintiff.

To which instruction and charge of the Court to the jury, the defendant then and there duly excepted, and exception allowed by the Court.

And, forasmuch as the refusal of the Court to give to the jury the defendant's requests to charge the requests do not appear of record, and forasmuch as the above mentioned instructions and charges given by the Court to the jury, and defendant's exceptions thereto, and the allowance of the said exceptions by the Court, do not appear of record, the defendant prays that this, its exceptions to the charge of the Court, and as its bill of exceptions thereto, may be allowed and sealed.

And said exceptions are accordingly allowed, and this bill of exceptions signed and sealed.

(Seal) C. H. HANFORD, Judge.

And, afterwards, to-wit: On the 6th day of October, 1892, there was duly filed in said Court in said cause, the bill of exceptions of the defendant, in the words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Defendant.

Complaint.

Be it remembered, that all of the testimony and evidence in this cause, was taken down in shorthand by Charles B. Eaton, official stenographer of this Court, and that he has translated and extended his shorthand notes into longhand, and duly certified to the same, and filed the same in this cause, with the Clerk of this Court. That said extended notes and translations contains, among other things, each question propounded, and the answer thereto, of each witness that testified upon the trial of this cause, together with all objections, rulings of the Court and exceptions taken upon the trial of this cause, and shows all of the testimony and evidence offered and introduced by each party, together with objections, rulings of the Court and exceptions taken thereon.

That all of the letters, contracts and paperwritings,

whatsoever, in evidence in this cause, was duly identified by the reporter, by letter and figure.

That each and all of said exhibits, both on the part of the plaintiff and on the part of the defendant, are appended to said extended notes of the shorthand reporter. And said report contains all the testimony and evidence in said case, and all of the exhibits properly marked and identified, and all of which duly certified to by the said reporter, is now on file in the office of the Clerk of this Court, and a part of the record in this cause, and are appended hereto and made part hereof, and the same are now and hereby made a part of this bill of exceptions with the same and like effect as if all the extended notes of the shorthand reporter, and all of the testimony and evidence in said cause, objection of counsel, rulings of Court, exceptions taken and allowed, and all letters, policies of insurance, applications for insurance, and all paper writings whatsoever referred to and appended to said extended notes of said shorthand reporter was herein copied and set out at length, and that the same shall in all respects be regarded and treated as if copied into this bill of exceptions in *haec verba*. And upon the trial of this cause before His Honor C. H. Hanford, District Judge, and a jury duly impaneled and sworn, the plaintiff to maintain and prove the issue on her part, offered in evidence the policy of insurance upon which this suit was brought, executed by the Pacific Mutual Life Insurance Company of California to Thomas Lea Nixon, number 16594, and dated the first day of September, 1889, and appended to the extended notes of the shorthand reporter and marked "Exhibit A," and now on file as a part of

the record in this cause in the office of the Clerk of this Court.

The defendant objected to the introduction of said policy in evidence for the reason that it shows upon its face that it is only a part of a contract of insurance which was made on September 1st, 1889, by and between the defendant and Thomas Lea Nixon, the husband of the plaintiff, and the insured under the policy. This policy shows upon its face that that it was issued in consequence of the agreements and representations made in the application, which application is made part of this contract of insurance. So that upon its face it shows that the contract is in two parts, and if either part is admitted we are entitled to have both — to have the contract presented as a whole and not in part. As offered then, we say, it is incompetent and inadmissible. And defendant's counsel then and there tendered the other part of the contract, the original of it, that the counsel for plaintiff may offer it in evidence, if he desires, and so done, then defendant will make no objection to it.

The Court—Do you propose to offer the application, or not, Mr. Relfe?

Mr. Relfe—I do not, no, sir; I do not think it is necessary for us to offer anything which is in the hands of the opposite party who has pleaded it. If they desire to offer it we shall make no objection to it.

The Court—I will overrule the objection. It will be admitted in evidence and marked Exhibit "A."

Mr. Fox—We desire an exception.

The Court—An exception is allowed.

Thereupon plaintiff, Mrs. Cora E. Nixon, was called as a witness in her own behalf, and after being duly sworn, among other things, testified as follows :

I know Mr. Edward C. Frost.

Q. Do you know whether the second premium on the policy sued hereon was paid or not?

A. Yes, sir.

It was paid to Mr. Frost, The payment was made to him by telegram, and was sent through the Merchant's National Bank of Tacoma to Ladd & Tilton's Bank in Portland. The money was transferred by the Ladd & Tilton Bank in Portland, to Mr. Frost.

Counsel for plaintiff thereupon handed witness a paper which the reporter then and there marked "Plaintiff's Identification 1," and which is a letter dated October 23d, A. D. 1890, purporting to have been written by Edward C. Frost to Thomas Lea Nixon; said letter is appended as an exhibit to the extended notes of the shorthand reporter, and is on file in this cause.

Thereupon the witness stated that she had seen the paper before, and that she found it on Mr. Nixon's desk among his papers.

Thereupon counsel for plaintiff handed witness two papers fastened together, which were marked by the reporter "Plaintiff's Identification 2," and which are appended as exhibs to the extended notes of the shorthand reporter, and are on file in the office of the Clerk of this Court in this case.

And upon cross-examination Mrs. Nixon was handed a letter by counsel for defendant, and asked if she wrote the letter, to which she answered that she wrote and

signed the letter, which was thereupon marked by the reporter as "Defendant's Identification 1," and is now appended as an exhibit to the said extended notes of the shorthand reporter, and is now a part of the record in this case on file in the office of the Clerk of this Court.

Upon re-direct examination Mrs. Nixon testified as follows:

Mr. Relfe—I will ask Mrs. Nixon one question about that.

Q. Mrs. Nixon, look at that envelope and letter ("Plaintiff's Identification 1"). Can you state if that envelope with the letter was found in Mr. Nixon's papers?

Mrs. Nixon—Yes, sir.

Mr. Relfe—Now, Your Honor, I offer in evidence this letter and envelope, the letter has been marked "Plaintiff's Identification 1," and the envelope accompanies it.

Mr. Fox—We object, in the first place, that they are not sufficiently proved and no foundation has been laid for their admission; and in the second place, that they are inadmissible under the pleadings.

The Court—I will sustain the objection. I think it is not legal evidence, for the reasons stated in the objection, and for the further reason that it is irrelevant.

Mr. Relfe—We except, your Honor.

The Court—Exception allowed.

Thereupon the plaintiff called Edward C. Frost, who being first duly sworn as a witness for the plaintiff, testified as follows:

I am the General Agent for the Pacific Mutual Life Insurance Company.

Q. Please examine the envelope and the enclosure. ("Plaintiff's Identification 1.") Did you write or authorize that letter to be written?

A. No, sir.

Q. You don't know anything about it? Was it submitted to you before it was sent?

A. No, sir. Every letter that is written in the office when I am present is submitted to me for my own signature.

Q. You don't know anything about that, then?

A. No, sir.

Q. Do you know who wrote it?

A. I expect the bookkeper, my bookkeeper, at that time wrote it.

Q. You never saw it before to-day?

A. No, sir.

Mr. Relfe—Now, your Honor, we will re-offer this this paper, "Plaintiff's Identification 1."

Mr. Fox—I make the objection that it is irrelevant, immaterial and inadmissible.

The Court—I sustain the objection.

Mr. Relfe—I ask for an exception.

The Court—An exception is allowed.

The plaintiff, by her counsel, thereupon stated as follows:

"We now offer in evidence the company's receipt, signed by the General Agent, Edward C. Frost, which has been marked 'Plaintiff's Identification 2.'"

Mr. Fox—I object to the paper which counsel offers being received in evidence as a receipt. It is not any such paper.

Mr. Relfe—I offer the paper for all the purposes of this case.

Mr. Fox—Then I object to it as irrelevant, immaterial and inadmissible.

The Court—I overrule the objection.

Defendant excepts and exception allowed.

Plaintiff's Identification 2, two papers fastened together, received in evidence and marked "Plaintiff's Exhibit B." The above and foregoing, including exhibits and stenographer's report of the evidence, being all the evidence offered and introduced on the part of the plaintiff to this point.

PLAINTIFF RESTS.

Thereupon the defendant, by its counsel, moved the Court to grant a nonsuit, upon the ground that plaintiff has failed to make out a case so as to put the defendant upon its defense, which motion was by the Court denied, to which ruling the defendant then and there duly excepted, and exception allowed by the Court.

DEFENDANT'S EVIDENCE.

Thereupon the defendant called William M. Fleming as a witness, who, being first duly sworn, testified as follows:

That in September, 1890, he resided in the City of Tacoma, and was special agent for the defendant, and that a few days, possibly a week, after the premium on the policy in suit became due he called at the office of Mr. Thomas Lea Nixon and had a conversation with him in reference to the policy in suit.

Q. I will ask you to state what that conversation was.

To which question the plaintiff, by her counsel, objected, and objection was sustained by the Court; to which ruling the defendant at the time duly excepted, and the exception allowed by the Court.

Mr. Fox—I now offer to prove by this witness that within the thirty days after the premium fell due, within the days of grace allowed, this witness, an agent of the company, called upon Mr. Nixon and had a conversation with him at his office, in which Mr. Nixon stated that he did not intend to pay this premium, but proposed to let the policy lapse.

To which offer the plaintiff objected, which objection was by the Court sustained; to which ruling the defendant excepted, and exception allowed by the Court.

Thereupon the defendant called Edward C. Frost, who, being first duly sworn, testified as follows:

On the same day that he received the money from the Teller of the Ladd & Tilton Bank he communicated with Mr. Nixon on the subject by letter, mailed through the regular channel, the postoffice, postage paid, the said letter being in the words and figures as follows, to wit:

October 31st, 1890.

Thomas L. Nixon, Esq., Tacoma, Washington:

Dear Sir:—I have this day received through Messrs. Ladd & Tilton, the sum of $517.80, which I hold in trust for you. Kindly have the enclosed blanks properly filled out by yourself and Mr. McCoy or Dr. Allan, and return to this office, on which they will be submitted to the company and if approved, I will receive the amount as

payment of second annual premium due September 1st, and now lapsed for non-payment, and send you company's receipt for same. Yours Very Truly,

EDWARD C. FROST."

Two blanks were enclosed in that letter. One which required Mr. Nixon's own personal statement that he was then in good health, had received no injury since the policy lapsed, and desired to be reinstated; the second was to be filled out by the medical examiner who made the examination on first application of Mr. Nixon, stating that he was then in perfect health, or in as good health as at the time of the application when the company received it.

Q. State whether or not the requests contained in that letter as to having those blanks filled out and returned, was ever complied with?

A. No, sir.

Q. Now, Mr. Frost, please state to the Court and jury, what was done with the money for which you had given that receipt, and with reference to which you wrote Mr. Nixon on that day.

A. It remained with Messrs. Ladd & Tilton, and was afterwards put to the credit of Mrs. Nixon at her call.

Q. And was never paid to the company?

A. No, sir.

Q. I call your attention to this letter, which has been marked, "Defendant's Identification 1." Did you receive that letter?

A. Yes, sir.

Q. About what time?

A. The 23rd of December A. D. 1890.

Mr. Fox—This is a letter if your Honor please, which Mrs. Nixon identified yesterday as one written by herself, to the witness. I now offer it in evidence. Being a letter written and signed by the plaintiff in this cause, to Mr. Edward C. Frost and marked, "Defendant's Exhibit 1," and now appended as an exhibit to the said extended notes on file in the office of the Clerk of this Court in this cause.

Q. Now, did you respond to that letter which has just been read?

A. Yes, sir.

Q. When?

A. This letter was replied to the 26th day of December, 1890.

Q. Is this letter I hand you, the one you refer to?

A. Yes, sir.

Mr. Fox—We offer the letter in evidence.

Objected to by plaintiff. Objection overruled. Exception allowed.

Letter received in evidence and marked "Defendant's Exhibit 2," and said letter is now appended to the said extended minutes of the shorthand reporter of record in this cause in the office of the Clerk of this Court.

Mrs. Nixon made no response to that letter.

Mr. Fox—I now offer if your Honor please, the letter of May 1st, 1891, the enclosed certificate of deposit and the envelope in which it was enclosed with original endorsements, the signature of Mrs. Nixon on the envelope being admitted.

To which the plaintiff objected. Objection overruled, by the Court. Exception allowed.

The papers introduced in evidence and marked "Defendant's Exhibit 3," and are now appended to the said extended notes of the shorthand reporter and filed in the office of the Clerk of this Court, in this cause.

Thereupon letter written in April, 1891, by Mr. Frost to Mrs. Nixon, was identified and received in evidence, and marked "Defendant's Exhibit 4," and which is now appended to the said extended notes of the shorthand reporter, and of record in this cause in the office of the Clerk of this Court.

The defendant thereupon offered in evidence the application of Mr. Nixon for the policy of insurance sued on in this action, and same was received in evidence and marked "Defendant's Exhibit 5," and same is now appended to the said extended notes of the shorthand reporter and is on file and of record in this cause.

Thereupon both plaintiff and defendant announced that they had no further evidence to offer in the case, and this concluded the evidence in the case.

And forasmuch as the facts aforesaid and the decisions of the Court thereon do not appear of record, the defendant prays that this, its bill of exceptions, may be allowed, and the same is allowed and sealed accordingly.

C. H. HANFORD, (Seal)
Judge.

Presented Dec. 28th, 1892.

Dollars 10,000.

The Pacific Mutual
Life Insurance Company of California.

Age, 40. No. of Policy, 16,594.
Dividend Investment Policy. Endowment.

This Policy of Insurance

Witnesseth that The Pacific Mutual Life Insurance Company of California, in consideration of the representations made to them in the application therefor, and of the agreements therein contained, which application is made a part of this contract, and of the sum of five hundred and seventeen dollars and 80 cents, and of the annual payment of a like amount, to be paid on or before twelve o'clock noon of the first day of September in every year during the continuance of this policy, does insure the life of Thomas L. Nixon of Tacoma, in the County of Pierce, and Territory of Washington, in the amount of ten thousand dollars, for the term of twenty years. And the said company does hereby promise and agree to pay the amount of the said insurance at its office in the City of San Francisco, to said Thomas L. Nixon or assigns, on the first day of September, 1909. Or should the person whose life is hereby insured die previous to the date last mentioned, leaving this policy unassigned, the said amount shall be payable, upon due notice and satisfactory proof of the death of the said insured, to Cora E. Nixon, wife of said Thomas L. Nixon.

In case of the maturity of this policy, the balance of the year's premium, and all indebtedness due or to become due to the company from the insured, or beneficiary,

shall first be deducted from the amount payable hereunder.

This policy is issued and accepted by the insured, and the owner thereof, on the following conditions and agreements:

First—That this policy is issued upon the "dividend investment plan," and the said company agrees that should the premiums be paid as herein stipulated for fifteen full years from the date hereof, and that should the life insured survive said period of fifteen full years, that said company will pay the beneficiary under this policy, at the expiration of said period, its equitable proportion of the Dividend Fund, in accordance with the options of the second condition of this policy.

Second—At the close of the Dividend Period the said insured under this policy has the following options: 1. To withdraw in cash the accumulated dividends, together with the guaranteed surrender value mentioned upon the margin of this policy, in which case the insurance shall then terminate. 2. To withdraw the dividend in cash and allow the guaranteed cash value to remain with the company, in which case the policy can be continued in force, according to its terms, as an ordinary participating policy, or (provided premium payments continue) entered for an additional dividend period, the rate being the same as previously paid. 3. The full amount of the guaranteed value and dividend may be used in the purchase of full paid life or endowment insurance. 4. The guaranteed cash value, or the dividend, or both funds, may be used for the purchase of an annuity, payable in cash through life. Provided, however, that due notice

in writing shall be given said company by the owners hereof before the expiration of the dividend period of the option selected, and if no such written notice is received by said company, said company shall have the unquestioned right to exercise any one of the options herein provided for; and provided further, that the option of continuing the insurance in any form beyond the time, or for a larger amount than provided for in the original policy, shall be contingent upon the said insured at that time furnishing to the company satisfactory evidence of being in proper insurable condition. This policy shall not be entitled to any share in the Dividend Surplus of said company, other than at such times and after the manner and upon the conditions prescribed in this section.

Third—After premiums upon this policy have been duly received by said company for not less than three complete years, a paid-up policy without profits may be issued for the same amount as is allowed by the rules of the company on the surrender of corresponding ordinary policies; provided always, that surrender of this policy, duly receipted, be made to the company at San Francisco, Cala., while by its terms in full force and effect, or within ninety days of its date of lapse.

Fourth—That after the payment of the first premium hereon, a grace of thirty days for the payment of premium shall be allowed, but only in case the same is paid during the life-time of the insured aforesaid:

Limits of Occupation—During the first two years of the continuance of this policy the life insured hereunder is not permitted to engage in blasting, mining, or sub-

marine occupations, or in the production of highly inflammable or explosive substances; or to work or manage a steam engine, or a circular saw, in any capacity; or to engage as a mariner, engineer, fireman, conductor, brakeman, or laborer in any capacity or service upon any sea, sound, inlet, river, lake or railroad; or to enter any military or naval service whatever, excepting into the militia when not in actual service, without permission in writing signed by the President or Vice-President and Secretary or Assistant Secretary. Should death occur in consequence of a violation of any of the foregoing provisions, a special waiver not having been previously obtained from said company, then in such case this policy shall be null and void.

Assignment—That this policy shall not be assigned without the consent of the company in writing being first obtained, and in such case due proof of interest must be produced with the proofs of death.

Alterations—That no alteration or waiver of the conditions of this policy shall be valid, unless made in writing at the office of said company in San Francisco, and signed by the President or Vice-President and Secretary or Assistant Secretary.

Provided, however, that after two years from the date hereof, and the full payment of premiums hereon for two years, the only conditions which shall be binding upon the holder of this policy are: that he shall continue to pay the premiums at the times and place and in the manner herein stipulated; that the regulations of the company as to age shall be observed; and that proof of loss and action for recovery, if any, shall be made and brought as pro-

vided. In all other respects, after the expiration of said two years, and payment of premiums as aforesaid, the liability of said company shall not be disputed, unless the death shall have been caused by the wilful act of the beneficiary hereunder.

In witness whereof, the said The Pacific Mutual Life Insurance Company of California has, by its President and Secretary, signed and delivered this contract at the City of San Francisco, this first day of September, in the year one thousand eight hundred and eighty-nine.

Examined.

"J. N. PATTON," "GEO. A. MOORE,"

Secretary. President.

The cash value of this policy, in addition to the dividend, all previous premiums hereon having been paid, will, upon the expiration of the Dividend Period, viz: September 1st, 1904, be ($6,430.00), six thousand four hundred and thirty dollars.

[Endorsed]:

Number 16,594.

Register No., I.

The Pacific Mutual Life Insurance Company of California, San Francisco.

20 Year Endowment D. I. Policy on the Life of Thomas L. Nixon, in favor of Wife.

Amount, $10,000.00.

Date, September 1st, 1889.

$517.80. Annual payment, payable on the first day of September.

Plaintiff's Ident. 1.
Plaintiff's Exhibit "C," (Part 1.)

PORTLAND, Oregon, Oct. 23d, 1890.

Thos. L. Nixon, Esq., Tacoma, Wash.

Dear Sir :—

I find, upon examination of our records, that your life premium in amount $517.80, has not been received at this office. As this directly affects your own interest, will you kindly notify me by return of your intentions, and oblige,

Yours very truly,
EDWARD C. FROST.

Plaintiff's Ident. 1.
Plaintiff's Exhibit "C," (Part 1.)

Pacific Mutual Life Insurance Co. of California. Edward C. Frost, General Agent Oregon & Washington, Office, N. E. Cor. Third and Oak Streets, Portland, Oregon.	Stamped Portland, Ore., Oct. 23, 4 P. M. 90. Thomas L. Nixon, Esq., Tacoma, Wash.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

Plaintiff's Ident. 2.
Exhibit "B."

PORTLAND, Oregon, Oct. 3, 1890.

Received from Ladd & Tilton, Bankers, five hundred seventeen 80-100 dollars, for account Thomas L. Nixon, policy per telegraphic instructions from Merchant's Natl. Dated Bk. Tacoma, 10-31, 1890.

$517.80. EDWARD C. FROST, Agt.

Duplicate.

Stamped, Ladd & Tilton, Bankers, Oct. 31, 1890.
Paying Teller.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

Plaintiff's Ident. 2.
Plaintiff's Exhibit "B."

Receipt of Frost, $517.80, Oct. 31st, 1890.
Ladd & Tilton, Bankers.

Portland, Or., Oct. 31, 1890.

Merchant's Natl. Bank, Tacoma, Wash.

Dear Sir:—

We debit $517.80 pd. E. C. Frost, Agent, as per your telegram of to-day, herewith please find his receipt.

Stamped, (Received Nov. 1, 1890. Answered.)

Yours truly,
Ladd & Tilton.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

Defendant's Exhibit 1.
Defendant's Ident. 1.

Tacoma, Wash., Dec. 22nd, 1890,

Mr. E. C. Frost,

Dear Sir:—

If you do not mean to accept the amount of premium, $517.80, on Mr. Nixon's life insurance policy, as such, I shall be pleased to have it returned, so that I may use it towards paying taxes. Mr. Nixon is not yet well enough to furnish a *perfect* health certificate, although he is gaining rapidly. I was under a false impression when I sent the money, thinking the time had not lapsed, but that the "30 days" was just up, the *last* of Oct. instead of

the first, making difference of a whole month; had gotten the idea from your letter of the 23d Oct., supposing from that, the time was not passed; and not wishing to worry my husband about it, he having said "he felt that he could not spare so large an amount, when he was not able to earn more, and guessed he would let it go." Undertook to attend to it myself, without sufficiently looking into the matter, and as I did not know where to find Mr. Flemming, he having no office here, sent the money direct to you. If Mr. Nixon wishes to be reinstated when he returns, he can then send the money; he is delighted with the climate at St. Helena, California, and does not wish to spend another winter in Tacoma.

Please accept Christmas Greeting for yourself and wife, from Yours very truly,

817 N. K. St., Tacoma. CORA E. NIXON.

Filed Sept. 27th, 1892. A. Reeves Ayres, Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

Samuel M. Marks, Assistant Secretary of the Pacific Mutual Life Insurance Company of California, being duly sworn deposes and says: that the foregoing and annexed application for insurance to said company by Thomas L. Nixon, dated August 15, 1889, is a true and correct copy of said application, in which Policy No. 16,594 was issued. SAMUEL M. MARKS.

Subscribed and sworn to before me this 19th September, 1892. GEO. T. KNOX.

(Seal) A Commissioner of Deeds for the State of Washington at San Francisco, California.

Filed Sept. 27, 1892. A. Reeves Ayres, Clerk.

This Abstract of the Application to be filled up at the Home Office only.

Application No. _____ Date of Policy, _____ 18 Amount, $ _____ Age _____ Annual Premium, $ _____

Policy _____ Agency _____ Form _____

Approved _____ Medical Director. Dated _____ of _____ 18

APPLICATION FOR INSURANCE TO

The Pacific Mutual Life Insurance Company of California.

QUESTIONS TO BE ASKED BY AGENT.

Statements and Representations required from persons proposing to effect Insurance on Lives in this Company, and which it is hereby mutually agreed do form a part of the Contract with the Company

1. a Name, at full length, of the person whose life is to be insured.
   b Occupation.
   Note.—In giving the occupation of the party it is not sufficient to state (for example) that he is a Merchant, Mechanic or Clerk, but the particular branch of business or trade must be specified and full particulars given where this occupation is in any way hazardous

   Residence, _____ Town _____ County _____ State _____

2. a Name, at full length, of the person to whom insurance is payable at death.
   b Residence. c Relationship to the person whose life is proposed for insurance?
   d In the event of the death of the above named beneficiary before the death of the insured, to whom shall the insurance be payable?
   e Residence? f Relationship to the person whose life is proposed for insurance?
   g In case of an Endowment Policy, state to whom the sum assured is to be payable in the event of the stipulated age or time being attained?
   h Residence? i Relationship to the person whose life is proposed for insurance?
   j If an Endowment Policy, to whom shall it be paid in case of the death of the beneficiary before the stipulated time or age is attained?
   k Residence? l Relationship to the person whose life is proposed for insurance?

3. a What form of policy do you desire? (Tables of rates must be used, write in full)
   b Sum to be assured

Premium how payable? PLACE.	Annually DAY	MONTH	Premium, $ YEAR.	AGE NEAREST BIRTHDAY

4. Give the place and date of your birth. (This statement must be exact)

5. Are you single or married?

6. Are you now and usually in good health?

7. a Are you now insured in this Company? (YES OR NO)
   b If so, what are the Numbers and Amounts of Policies?
   c If you are not insured, but have been heretofore, state the Numbers of Policies.

   Give the number of each Policy and the amount assured thereby, separate li

8. a Have you any other insurance on your life?
   b If so state in what companies, *when taken, the kinds of policies, and their respective amounts.*

9. a Is any negotiation for other insurance now pending or contemplated?
   b In what company?

10. a Have you ever applied to any agent or sought insurance in any company which either postponed or refused to issue a policy, or declined to issue a policy of the exact kind and amounts applied for?
    b If so, state companies and cause

11. a Have you resided out of the United States? When, where, and for what purpose?
    b Have you ever made either a temporary or permanent change in your residence on account of your health?
    c Do you contemplate a change in residence? If so, when, to what place, and why? That is, whether for purposes of business, health or pleasure?

12. a Has your Weight recently increased? c If so, to what extent, and how rapidly?
    b Or diminished?

13. Do you use Spirits, Wine or Malt Liquors, daily, or occasionally, and to what extent?

14. a Are you engaged in or connected with the Manufacture or Sale of Malt, Vinous or Spirituous Liquors?
    b If so, in what capacity?
    c Are you intending to engage in such a business?

15. a Do you use Tobacco?
    b Do you use Opium or any other Narcotic?
    c If you use Tobacco, Opium or any other Narcotic, state which, in what form, and how much consumed daily?

16. a Are your Habits of Life correct and temperate?
    b Have they always been so?

17. Do you understand and agree that only the officers at the Home Office have authority to determine whether or not a policy shall issue on any Application, and that they act only on the statements and representations in the Application, and that no statements, representations or information made or given by or to the person soliciting or taking this Application for a Policy or to any other person shall be binding on the Company, or in any manner affect its rights, unless such statements, representations or information be reduced to writing and presented to the officers of the Company at the Home Office in this Application

18. If a Female, do you wish a policy in the Female Department?

IT IS HEREBY DECLARED AND WARRANTED that all the statements and answers made in this Application (including the answers to questions to be asked by Agent and the questions to be asked by the Medical Examiner) are complete and true and that they together with this declaration and agreement constitute an application to THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, for a policy of Insurance and are offered as a consideration for the Policy hereby applied for. And it is agreed that this shall be no contract of insurance until a Policy shall have been actually delivered to the said Company and the first premium thereon paid, while the person proposed for insurance is living and in the same condition of health described in this Application, and that said Policy be issued the declarations, agreements and warranties herein contained shall constitute a part of the contract, and the contract of insurance when made shall be held and construed subject to all terms and clauses to have been made in the City of San Francisco in the state of California. It is also agreed and warranted that the person proposed for insurance will not die by his or her own act during the period of two years from the date of the Policy issued upon this Application.

That the said distribution or surplus, the principles and methods which may be adopted by the Company for such distribution, and the determination of the amount equitably belonging to any Policy which may be issued under this Application shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed.

That in the event of the death of the insured shall or given to the Company such formal proofs thereof in accordance with the rules of the Company shall be furnished within six months after the said death and that suit or action for the recovery of any claim under said Policy shall be maintainable unless commenced within twelve months after the death has occurred.

That as an agreed consideration and the policy proposed for issued in case a Policy is issued upon this Application will not practice any pernicious habit that, naturally tends to the shortening of its, and that it shall be its duty to give to such habits a full name in any sense or inebriate or have delirium tremens or be convicted of a felon and Company upon becoming informed of such fact shall have the unquestioned right to terminate the contract and cancel the Policy upon the payment or tender in good faith of the full legal reserve thereon computed according to the American Table of Mortality with interest at the per cent per an. and

It is agreed that the policy issued upon this Application shall become null and void if the premium thereon is not paid as provided there in and should such Policy become null and void by reason of the non payment of premium at the time it is made shall be forfeited to the Company except as therein otherwise provided

In Witness Whereof, I _____ have hereunto set my hand this _____ day of _____ 18 _____ and every question made is true answered

Dated _____ the _____ day of _____ 18

Policy to be dated the first day of _____ 18

All Policies of the Company are issued as of the first day of the month.

In presence of _____

Witness _____

Agent _____

Signature of the Applicant _____
Person to whom Benefit of Insurance is applied to _____

Instructions as to Signature.

1 Husband may sign for wife. Thus: Mary (nee by John Doe
2 If be unconscious to procure her own signature

Signature of the Person whose Life is to be insured or Examined

When Assignment of the benefit of Married Women should be signed
Where the signature [illegible] and [illegible]

This Margin is for Binding; do not write upon it.

Defendant's Exhibit 3, (Part 1)

Portland, Oregon, May 1st, 1891.

Mrs. T. L. Nixon, Tacoma, Wash.

Dear Madam—

Enclosed please find certificate of deposit No. 73,673, in amount $517.80, that we failed to enclose in our letter to you under date April 30th.

Very Truly Yours,

Edward C. Frost.

Per H.

Defendant's Exhibit 3, (Part 3)

Refused, Cora E. Nixon.

59 Home Office Building Pacific Mutual Life Ins. Co. Of California. Edward C. Frost, Gen. Agt., Oregon and Wash. Office, N. E. cor. Third & Oak Sts. Portland, Oregon.	Stamps 5 2 cent and 1 10 cent. 2239 1597 Rec. May 4, 91 1661 1211 Edward C. Frost, Tacoma, Pierce Co. Wash.,

Portland, Or., May 5, 1891.

Registered.

Stamped, Portland, Oregon, May 2, 1891.

Filed Sept. 27, 1892. A. Reeves Ayres, Clerk.

Defendant's Exhibit 4.

Portland, Oregon, April 30th, 1891.

Mrs. T. L. Nixon, Tacoma, Wash.,

Dear Madam—

We have this day placed to your credit with Ladd & Tilton, Bankers of this city, the amount of $517.80.

Said sum having been received from you October 31st, 1890, and held in trust by me, in accordance with terms embodied in my letter of same date.

I have carefully and thoroughly submitted all the facts, correspondence, &c., in this case to the home office for their consideration, and they instruct me to say that my position in this matter is eminently correct; there is no legal claim under Policy No. 16594, as said policy lapsed and was not restored to risk. Therefore the blanks requested cannot be furnished.

Respectfully yours,

EDWARD C. FROST.

Filed September 27th, 1892. A. Reeves Ayres, Clerk.

Defendant's Exhibit 2.

PORTLAND, Oregon, Decr. 26, '90.

817 North K St., Tacoma, Wash.,

Dear Mrs. Nixon—

Yours of the 22d inst. to hand. I called to see you in Tacoma one day only after yourself and Mr. Nixon had left for the South. Knowing the state of Mr. Nixon's health at the time the policy payment was due, I sent him several notices and asked my agent Fleming to see him also; but not hearing, I concluded he did not want to carry it. I sent however, several reminders to him, as the Policy allows 30 days grace. After the 30 days the Policy can only be restored during 90 days unless the deposit of premium is made with the agent or company. This you have done, and now you must decide what to do, for if you withdraw the deposit you will forfeit the right to restore the Policy to risk, as the 90 days are

gone by. I thought from what I heard from Dr. McCoy that in all probability Mr. Nixon would by this time be able to pass the required test, which is not severe, and if you think he is able, and will give me the permission, I will write to the Company and have the nearest Medical Examiner to where he is staying, see him. It is a pity that he should lose the insurance, which he may not be able to get again even if he wants to, and also to lose the money he has already paid in.

I expect to be in Tacoma in January, and will call and see you about this. However, if in view of the case you desire to have the deposit returned, I will do so at once. Wife joins me in kindest regards and hopes for Mr. Nixon's perfect recovery. With many "Happy New Years,"

Yours very truly,

E. C. Frost.

(Written on side of sheet.)

I assure you I would and have done all in my power to protect your interests. All Life Ins. Cos. are very strict, and if I had accepted the payment when sent by you I should be held liable to forfeit my bonds of $7,500.00.

Filed Sept. 27, 1892. A. Reeves Ayres, Clerk.

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Plaintiff's Case.

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In the United States Circuit Court for the District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY (a corporation),
Defendant.

Transcript of Testimony taken on the trial of the above entitled action before Honorable C. H. Hanford, J., and a jury, at the Court room of said Court, in Tacoma, Pierce County, Washington, on the 27th and 28th days of September, 1892.

Appearances.

For the plaintiff—

Mr. Relfe, of Seattle, Mr. Thomas Carroll and Mr. Leroy Palmer, of Tacoma.

For the defendant—

Mr. Charles N. Fox, of San Francisco, Cala., and Mr. Charles S. Fogg, of Tacoma.

Tacoma, Wash., 11 A. M.
Tuesday, September 27th, 1892.

This cause coming on regularly for trial on this day, in open Court, and at a regular term of this Court, the plaintiff being present in person, with her attorneys, and the defendant being represented by its attorneys, a jury having been duly impaneled and sworn to try the case, thereupon proceedings were had and testimony taken as follows:

The Court—Gentleman of the jury, you will now be permitted to separate until two o'clock. You must not converse about the case with each other nor with any other persons, nor listen to anything that may be said about it by anybody. Have no intercourse whatever with the attorneys, witnesses, or other persons interested in the case. Try to avoid, as much as possible, getting any impression about the case outside of the court room.

Court will now take a recess until two o'clock.

Tacoma, Wash., 2 P. M.
Tuesday, September 27th, 1892.

All present; proceedings continued pursuant to adjournment.

Mr. Relfe—If the Court please, we wish to make a motion to strike out a portion of the matter in the amended complaint on the ground that it is redundant and irrelevant. The clauses we move to strike out are the fifth and sixth clauses.

After argument by counsel.

The Court—I will deny the motion. It may have been unnecessary to have this matter in the answer, and it is a part of the contract sued upon and alleged to be a part of the contract.

Mr. Relfe—Will your Honor give us an exception?

The Court—An exception is allowed.

Plaintiff's case opened to the jury by Mr. Palmer.

Defendant's case opened to the jury by Mr. Fox.

Mr. Relfe—If your Honor please, we will first offer in evidence the policy upon which suit is brought. The policy I offer in No. 16,594, executed by The Pacific Mutual Life Insurance Company of California to Thomas Lea Nixon, dated the 1st day of September, 1889.

Mr. Fox—We object. That is incompetent as offered for that it shows upon its face that it is only a part of a contract of insurance which was made September 1st, 1889, by and between this defendant and Thomas Lea Nixon, the husband of plaintiff, and the insured under the policy. The policy shows upon its face that it was issued in consequence of the agreements and representations made in the application, which application is made part of this contract of insurance. So that upon its face it shows that the contract is in two parts, and if either part is admitted we are entitled to have both—to have the contract presented as a whole and not in part. As

offered then, we say, it is incompetent and inadmissible. And I now tender the counsel the other part of the contract, the original of it, and he may offer it if he likes, and then we will make no objection to it.

The Court—Do you propose to offer the application or not, Mr. Relfe?

Mr. Relfe—I do not, no sir; I do not think it is necessary for us to offer anything which is in the hands of the opposite party who has pleaded it. If they desire to offer it, we shall make no objection to it.

The Court—I will overrule the objection. It will be admitted in evidence and marked Exhibit A.

Mr. Fox—We desire an exception.

The Court—An exception is allowed, and it will be considered as read to the jury.

Paper referred to, received in evidence, and marked "Plaintiff's Exhibit A."

Mr. Relfe—We will call as our first witness, Mrs. Cora E. Nixon.

Mrs. Cora E. Nixon, Plaintiff, called as a witness on her own behalf, being first duly sworn, testified:

Examination-in-Chief by Mr. Relfe.

Q. You are the plaintiff in this, are you not?

A. I am.

Q. The widow of Thomas Lea Nixon?

A. Yes.

Q. Do you know Mr. Frost?

A. Yes.

Q. You know Mr. Edward C. Frost, who was connected with The Mutual Life Insurance Company of California?

A. I do know him.

Q. Did you know him in the year 1889 and 1890 ?

A. I do not remember of seeing him at that time.

Q. I did not ask you if you saw him; did you know him ?

A. Yes, sir.

Q. Do you know his signature ?

A. No, sir.

Q. Do you know whether the second premium on the policy, sued hereon, was paid or not ?

A. Yes, sir.

Q. It was paid ?

A. Yes, sir.

Q. To whom was it paid ?

A. To Mr. Frost.

Mr. Fox—Which premium are you inquiring about?

Mr. Relfe—The second premium ; you admit payment of the first ?

Mr. Fox—Yes, sir.

Q. What relation, do you know, did Mr. Frost then occupy towards this defendant, The Pacific Mutual Life Insurance Company ?

A. That of general agent.

Q. How much was the amount of that premium paid to him, under this policy ?

A. $517.80.

Q. How was the payment made to him ; what was the method of payment ?

A. It was sent by a telegram through the bank.

Q. Through what bank ?

A. Through the Merchant's Bank of Tacoma, the Merchant's National Bank, of Tacoma.

Q. Directly to Mr. Frost ?

A. To Ladd & Tilton's Bank.

Q. Ladd and Tilton ?

A. I believe so.

Q. Where ?

A. In Portland.

Q. The money was delivered by the Ladd & Tilton Bank in Portland, to the Merchant's Bank here, for Mr. Frost ?

A. It was sent by the Merchant's Bank, to Portland to Mr. Frost, through Ladd and Tilton's Bank, I think.

Q. Transferred to Mr. Frost ?

A. Yes, sir.

Q. Is that it ?

A. Yes, sir.

Q. How did the Merchants' Bank come to send it ?

A. The Assistant Cashier sent it.

Q. Who directed th Assistant Cashier to send it ?

A. I did.

Counsel hands witness a paper which the reporter has marked "Plaintiff's Identification 1."

Q. I wish you would look at this paper, "Plaintiff's Identification 1." I will ask you whether you have ever seen that paper before ?

A. Yes, sir; I have.

Q. Where did that paper come from, if you know ?

A. It came from Mr. Frost.

Q. I mean, where you find it,—where did you see it ?

A. On Mr. Nixon's desk.

Q. It was on Mr. Nixon's desk ?

A. Yes, sir.

Q. Among his paper ?

A. Yes, sir.

Two papers, fastened together, which have been marked by the reporter "Plaintiff's Identification 2," handed to witness.

Q. I will ask you if you have ever seen these papers before ?

A. I have seen them.

Q. State where they came from, and who received them ?

A. They were received by the Merchant's National Bank, and Mr. Davis gave them to me.

Q. Mr. Davis is the Cashier ?

A. Yes, sir.

Q. They were received by the bank, and the Cashier gave them to you ?

A. Yes, sir.

Q. Mrs. Nixon, what was the date of this payment ?

A. The 31st of October, 1890.

Q. Will you explain why it was not paid earlier ?

No answer.

Q. What effort did you make before that to pay it during October, or any other time ?

A. I tried to find Mr. Fleming, the local agent here, who I supposed was the proper person to pay it to.

Q. Well, could you find the local agent, Mr. Fleming ?

A. He was out of town.

Q. What effort did you make to find him ?

A. I went in company with my cousin, who knew

where he boarded, and knew him, to his hotel, the Palmer House; he was not in.

Q. He was out of town, was he?

A. We were told he was out of town; I don't remember where.

Q. Do you know whether he returned to town before the end of October or not?

A. I don't think he did; I did not hear of it.

Q. Well, what, if anything, did you hear?

The Court.—I think you are liable to spend time unnecessarily on irrelevant matters, from the opening statements made on both sides. The reasons for not paying the premiums sooner, and the conversations or correspondence that occurred, the statement that Mr. Nixon had said he would not pay any more premiums—all those things I think are immaterial. The liability of this company would be fixed, if at all, by what occurred at the time the money was sent and received by Mr. Frost, and what occurred after that, not what occurred before.

Mr. Relfe—I understand it is insisted, or will be, by the defendant, that the mere fact of payment after maturity, under the contract constitutes a forfeiture, or justifies the forfeiture unless we show reasons that would explain and satisfy that objection we will have no right to recover. I only wanted to ask one further question in that connection, and that was, what, if anything, she heard as coming from the local agent in reference to the payment or non-payment of that premium during the month of October.

The Court—I do not think it would benefit either party to go into matters of that kind. The terms of the policy and the actual transactions that took place, what was

said, done or written in connection with the actual payment of the money, is all that has any legal bearing on this case.

Mr. Relfe—We propose to show, your Honor, that it was approved by the company and its agent that we might defer payment, and we were told that if it was paid any time during the month of October it would be sufficient. Now, we say, if that is the fact the company is estopped from charging us with dereliction on that ground, inasmuch as we did not pay within the time indicated; and certainly they could not adopt such a course of conduct as would lead us to delay our payment and then attempt to take advantage of that fact, and we now simply offer, in good faith, to show the cause of that delay, and offer this testimony for the purpose of bringing out that feature and none other.

The Court—I have indicated my views simply from a desire not to have the case weighted down with inquiries about matters that are not important and which cannot be taken into legal consideration. Of course there has been no objection and I have volunteered my opinion on these questions, but I am willing to sustain an objection made on either side to any offer of such testimony as was proposed in the opening statements of counsel on both sides, either to prove excuses for not making the payment sooner, or to show what took place in the way of conversation or correspondence between the parties prior to the time that the money was sent.

Mr. Relfe—We will put the question so as to get the ruling of the Court, if objection is made.

Q. I will ask you this question: What, if anything, did you hear as coming from the agent of the company here, to the effect that the payment of that second premium might be made at any time before the last of October, 1890?

Mr. Fox—That is objected to as incompetent and inadmissible under the contract, and irrelevant and immaterial under the pleadings.

The Court—I will sustain the objection.

Mr. Relfe—We desire an exception.

The Court—An exception is allowed.

Q. Your husband died April 16th, 1891?

A. Yes, sir.

Q. Did any other premium become due, or did he die before any further premiums became due?

A. He did.

Mr. Relfe—Take the witness.

Cross-Examination by Mr. Fox.

Q. Mrs. Nixon, do you remember what day you sent that money, the day you say you ordered the bank to forward it by telegram?

A. The 31st day of October, 1890.

Q. Where was your husband at that time?

A. He was at home.

Q. You are not the party who made this contract of insurance, are you?

A. *Mr. Relfe*—That is objected to as immaterial and irrelevant, and asking a legal question of the witness.

The Court—I overrule the objection. She can state what her understanding about it was. Of course, the

contract shows upon its face who the parties to it were, but it is proper cross-examination.

A. I would judge that I was interested in the contract as much as any one.

Q. Well, whatever your interest was, is shown by the contract itself, is it not?

A. Yes, sir.

Q. Did you not know at the time you sent that money and sometime before that, that your husband had refused to pay that premium?

A. I did not.

Q. Did he not tell you that he would not pay it?

A. No, sir.

Q. Did you not write Mr. Frost, that he had told you that he would not pay it, and so you took it upon yourself?

A. I do not remember that I did.

Paper handed witness.

Q. Look upon that paper, Mrs. Nixon, and say if that is your handwriting.

A. That explains itself, as well as I can.

Q. But did you write that letter?

A. I did.

Q. And that is your signature and in your writing?

A. Yes, sir.

Mr. Fox— I ask you to have that letter marked for identification.

Letter referred to, marked "Defendant's Identification 1."

Q. I will ask you, Mrs. Nixon, to look at the signa-

tures to this application for life insurance, and say whether that is your husband's signature or not.

Mr. Relfe—We will admit that it is.

Mr. Fox—That is all.

Re-Direct Examination by Mr. Relfe.

Q. I would like to ask you, with the permission of counsel, a question which I forgot on the examination-in-chief. I will ask you, Mrs. Nixon, if, after the death of your husband, you applied to the company, or its agents, for blanks upon which to make the proof of death?

A. I did.

Q. Were they furnished?

A. No, sir.

Q. Were they refused?

Mr. Fox—There is no issue made on that point. The only issue we make in this case, is as to whether they paid that second premium.

The Court—I do not think you need to go into that.

Mr. Relfe—That is all, then.

Mr. Fox—That is all.

Examination of Mrs. Nixon closed.

Mr. Edward S. Orr, called as a witness for the plaintiff, and having been first duly sworn, testified:

Examination-in-Chief by Mr. Relfe.

Q. Do you live in Tacoma?

A. Yes, sir.

Q. Did you know Mr. Nixon in his lifetime?

A. Yes, sir.

Q. Do you know Mrs. Nixon?

A. Yes, sir.

Q. Do you know Mr. Fleming, the Local Agent of The Pacific Mutual Life Insurance Company?

A. Yes, sir.

Q. Did you know him in 1889 and 1890?

A. I knew him in 1890.

Q. I will ask you whether Mr. Fleming at any time said anything to you to be conveyed to Mrs. Nixon, as to whether the second premium on this policy—this Nixon policy—could be paid any time during the month of October, before the last of the month?

Mr. Fox—I object to that as irrelevant, immaterial inadmissible under the pleadings, and incompetent.

The Court—I sustain the objection.

Mr. Relfe—We ask for an exception.

The Court—An exception is allowed.

Mr. Relfe—That is all.

Mr. Fox—That is all.

Examination of Mr. Orr closed.

Mr. Relfe—Judge Fox, do you admit that the signa, to Plaintiff's Exhibit 1, is Mr. Frost's signature, and admit that he wrote that letter?

Mr. Fox—We cannot admit that that letter was written by Mr. Frost.

Mr. Relfe—The letter is typewritten; do you admit that it is his signature?

Mr. Fox—We cannot admit that.

Mr. Relfe—Do you refuse to admit that he wrote this letter or authorized it to be written, or signed it?

Mr. Fox—Yes, sir.

Mr. Relfe—Then I will have to ask Mrs. Nixon one question about that. Mrs. Nixon, look at that envelope

and letter ("Plaintiff's Identification 1.") Can you state if that envelope, with the letter, was found in Mr. Nixon's papers?

Mrs. Nixon—Yes, sir.

Mr. Relfe—Now, your Honor, I offer in evidence, this letter and envelope, the letter has been marked "Plaintiff's Identification 1," and the envelope accompanies it.

Mr. Fox—We object; in the first place, that they are not sufficiently proved, and no foundation has been laid for their admission, and in the second place, that they are inadmissible under the pleadings.

The Court—I will sustain the objection. I think it is not legal evidence, for the reason stated in the objection, and for the further reason that it is irrelevant.

Mr. Relfe—We except, your Honor.

The Court—Exception allowed.

Mr. Relfe—We will call Mr. Frost on that point.

Mr. Edward C. Frost called and sworn as a witness for the plaintiff, testified:

Examination-in-Chief, by Mr. Relfe.

Q. You are Mr. Edward C. Frost?

A. Yes, sir.

Q. The General Agent of The Pacific Mutual Life Insurance Company?

A. Yes, sir.

Q. Please examine this envelope and the enclosure ("Plaintiff's Identification 1"). Did you write or authorize that letter to be written?

A. No, sir.

Q. You don't know anything about it?

A. It was sent from my office I see, and signed by the bookkeeper, I presume.

Q. You don't know anything about it? Was it submitted to you before it was sent?

A. No, sir. Every letter that is written in the office when I am present is submitted to me for my own signature.

Q. You don't know anything about that, then?

A. No, sir.

Q. Do you know who wrote it?

A. I expect the bookkeeper; my bookkeeper at that time wrote it.

Mr. Fox—Well, do you know? Do you know who did write it? That is the question.

A. I did not see it written, sir; I could not. No, I don't know.

Q. You never saw it before to-day?

A. No, sir.

Q. Are any of your employes in the habit of writing important letters of that character without your knowledge or direction?

Mr. Fox—I object to that as irrelevant and immaterial.

The Court—It is preliminary. I will allow the question.

A. Notices are sent of premiums due without any special supervision.

Q. I say, letters of this character?

A. That is a notice of premium due,—yes.

Q. Never mind what it is. I will read it to the jury if you undertake to state its contents. I say, are your employes, or those in your office in the habit of writing

letters of this character without your knowledge or consent?

A. Yes, sir, of that character; yes, sir.

Q. They are?

A. Yes, sir.

Q. Are your employes and subordinates in your office permitted to write letters to policy holders after the maturity of the premium, giving direction as to the payment thereof?

A. Yes, sir.

Mr. Relfe—That is all.

Cross-Examination by Mr. Fox.

Q. Was there anybody in your office, or was even yourself authorized to write letters with reference to premiums more than thirty days past due.

Mr. Relfe—We object to that, your Honor, because it is established in testimony here that he is a General Agent of the company and his authority, and the scope of his acts cannot be limited by his own testimony.

The Court—I will overrule the objection.

Mr. Relfe—We ask for an exception.

The Court—Exception allowed.

A. Yes, authorized to write letters concerning them, but not to receive them. A policy holder—

Mr. Relfe (Interrupting)—Wait a moment. Answer that question and stop. We object to your going any further without further questions.

Mr. Fox—I have no further cross-examination.

Mr. Relfe—That is all.

Examination of Mr. Frost closed.

Mr. Relfe—Now, your Honor, we will re-offer this paper, "Plaintiff's Identification 1."

Mr. Fox—I make the objection that it is irrelevant, immaterial and inadmissible.

The Court—I sustain the objection.

Mr. Relfe—I ask for an exception.

The Court—An exception is allowed.

Mr. Relfe—We now offer in evidence the company's receipt signed by the General Agent, Edward C. Frost, which has been marked "Plaintiff's Identification 2."

Mr. Fox—I object to the paper which counsel offers being received in evidence as a receipt. It is not any such paper.

Mr. Relfe—I offer the paper for all the purposes of this case.

Mr. Fox—Then I object to it as irrelevant, immaterial and inadmissible.

The Court—I overrule the objection.

Mr. Fox—We except.

The Court—Exception allowed.

Plaintiff's Identification 2, two papers fastened together, received in evidence and marked "Plaintiff' Exhibit B."

Exhibit B read to the Jury by M. Relfe.

Mr. R. J. Davis called as a witness for the plaintiff, and being first duly sworn, testified :

EXAMINATION-IN-CHIEF BY MR. RELFE.

Q. What is your name ?

A. R. J. Davis.

Q. What business are you in ?

A. I am Assistant Cashier of the Merchant's National Bank of Tacoma.

Q. Were you in that same position in October, 1890?

A. I was.

"Exhibit B" handed witness.

Q. Please examine that receipt there and say if you have seen it before?

A. I have.

Q. State what your connection was with that receipt, —that transaction, briefly to the Jury?

A. Acting for the Merchant's National Bank, I telegraphed Ladd and Tilton, Bankers, Portland——

Mr. Fox—I object to what you telegraphed unless the telegram is produced.

Mr. Relfe—I understand we can produce that telegram if necessary, but this is merely descriptive. Go on.

A. To pay Edward C. Frost, Agent, $517.80, on account Thomas L. Nixon policy, and in compliance with the telegram they advised us that they did pay the money, and sent this receipt (Exhibit B") in evidence of it.

Q. For whom did you do that, Mr. Davis?

Mr. Fox—That is objected to as irrelevant and immaterial.

Q. For whom did the Bank do it?

Mr. Fox—That is objected to as irrelevant and immaterial.

The Court—I will overrule the objection.

A. For Mrs. Cora E. Nixon.

Q. The plaintiff?

A. Yes, sir.

Q. Now, have you your telegram that you sent them, sent to Ladd & Tilton ?

A. I have neither the telegram nor copy with me ; I might have brought the copy as well as not. I had a memoranda which I took from the copy. Of course the office can produce the telegram if you want it.

Mr. Fox—You say you took that memorandum from the copy. Is that a letter press copy ?

A. It is.

Q. Is that memoranda an exact copy of the letter press copy of the telegram ?

A. Yes, sir.

Mr. Fox—Perhaps I will admit that. What I want to get at is to know just how it read. If the witness can now read to us as if he had the copy before him, and testify that it is just what the copy shows, I am satisfied with it.

Q. Can you do that ?

A. I can.

Q. Proceed.

A. The telegram read as follows: "October 31st, 1890. Ladd & Tilton, Bankers, Portland, Oregon. Paygent Edward C. Frost, Agent, disbelieve deaconess cloud account Thomas L. Nixon policy free mason alpha Merchants National Bank."

Q. Now, please translate that into English.

A. Which translated, means, "Pay to Edward C. Frost, Agent $517.80 account Thomas L. Nixon policy, Friday 12 o'clock noon." Signature. That is the last word is the telegraphic signature of the bank.

Q. The Merchants' National Bank?

A. Yes, sir.

Q. That cipher was the one used between your bank and Ladd & Tilton's Bank?

A. I have the cipher with me.

Q. I say it was one you had between the two banks, which both understood?

A. It was.

Mr. Relfe—That is all.

Mr. Fox—That is all.

Examination of Mr. Davis closed.

Mrs. Cora E. Nixon, plaintiff, re-called, testified:

Examination-in-Chief by Mr. Carroll.

Q. Mrs. Nixon, I hand you a paper marked "Plaintiff's Identification 1," and ask you to look at that paper carefully; and then I will ask you to state whether or not that had anything to do as an inducement to you to send the money to Mr. Frost at the time you did send it?

Mr. Fox—That is objected to as immaterial, incompetent and inadmissible.

The Court—The question is a leading question.

Q. I will put it in this form: State what, if any, effect——Or first, I will ask you when you first knew of this letter, when you first saw it, as near as you can give us the date.

A. I don't know the exact date, but it must have been a very few days after it was received because it was right open just like that (indicating).

Q. Well, was it before you sent the $517.80 or not?

A. It was before.

Q. Then how long before, as near as you can recollect?

Mr. Fox—I object.

The Court—Objection overruled. It is a preliminary question.

A. It was a full week, if not more; it was a week anyway.

Q. About a week you think?

A. Yes.

Q. And not more than a week?

A. Yes; during that week.

Q. Now, I will ask you state what, if any, effect this letter had upon you as an inducement, or otherwise, to pay that premium?

Mr. Fox—That is objected to as irrelevant, immaterial, incompetent and inadmissible.

Mr. Carroll—We claim that there is sufficient inducement in this for Mrs. Nixon to pay that money. This is offered simply in explanation of how that money happened to be sent at that time, or as showing a reason justifying her in sending the money and getting that receipt after the premium was due. We think the two bear that relation, one to the other, and that they both ought to go to the jury in this case.

The Court—I do not think the effect of the payment to, or the receipt by Mr. Frost of the money would be at all changed by what preceded it. I am of the opinion that this matter is irrelevant, and will sustain the objection.

Mr. Carroll—We except.

The Court—Exception allowed.

Mr. Relfe—There is an allegation here, your Honor, in the reply as to the nonforfeiture law of California. We have pleaded that act, but Brother Fox says that it has been repealed. We want to offer it before we finally close our case, but we are not prepared to do so at this time.

The Court—I do not think that would come in properly at this time. I think that is a part of your case in rebuttal.

Mr. Relfe—With that understanding, then, we will rest our case.

Plaintiff rests.

Mr. Fox—If your Honor please, plaintiff having rested, I now move a nonsuit on the ground that plaintiff has failed to make out a case such as puts the defendant upon its defense.

Argument of the motion for nonsuit by Mr. Fox.

The Court—I do not care to hear any argument from the plaintiff's side on this motion. The answer admits the making of a contract, admits the policy, and while it pleads the application as a part of the contract, yet it is pleaded defensively, and enough appears to show that it is within the possession of the insurance company, and not in the possession of the plaintiff at the time suit was brought; and I think, upon the admissions in the pleadings, without any proof of the contract at all, that the defendant is put to its defense as to any matter relating to the contract, and as to its terms enough is admitted on the face of the pleadings to entitle this plaintiff to recover on the policy of insurance issued by the defendant

company, unless for failure on the part of the assured to pay the premiums. All rights under the policy were forfeited.

Now, as to that there is really but a single issue here. This answer denies that the second premium was paid; it also denies that the second premium was tendered within the period of thirty days after it was due, which, by the terms of the policy, were allowed for the payment. The other pleadings in the case the complaint and the reply, take the case away from any pretense of a tender made and rejected, and the case is narrowed right down to a question of payment, and on that issue, it is my opinion that there is enough evidence to carry the case to the jury to let them decide whether the defendant received the payment or not. While it is true that time is a material part of the contract of life insurance, it is not of such a character that payment after the lapse of the time, or anything that the defendant would not have a right to accept and bind itself by its acceptance. It amounts to just this, that a payment tendered after the lapse of time if refused on the part of the company ends the matter; the company is under no obligation to receive it, but after the time has elapsed it may receive it, and if it does receive it it is a payment. Now, that is the issue in this case, whether there was a payment or not. There is evidence here tending to prove, and enough for the jury to pass on, that the plaintiff in this case parted with her money, and that money has been placed into the hands of a general agent of the company some months before Mr. Nixon died, and I shall submit it to the jury whether they find that evidence sufficient to warrant finding, as a

matter of fact, that the money got into the treasury of the company. The motion is denied.

Mr. Fox—We will save an exception, if your Honor please.

The Court—An exception is allowed.

Gentlemen of the jury, the admonition I gave you this noon must be observed until this case is finally submitted and decided by you.

We will adjourn until to-morrow morning until half past ten.

Tacoma, Wash., 10:30 A. M.
Wednesday, Sept. 28th, 1892.

All present; proceedings continued pursuant to adjournment.

Mr. Fox—If the Court please, we have a motion to present in this case. As a part of the reply filed in this case the plaintiff pleads a law of the State of California, which I read to your Honor yesterday in my argument for non-suit. We have filed a motion to strike from the reply that part of the pleading on the ground that the Circuit Court of the United States takes judicial notice of the laws of the various States, and therefore the law is not properly pleaded.

After argument on the motion.

The Court—I will sustain the motion to strike this matter out of the reply, and if there are enough facts—I would not want to state dogmatically now that there are not, but if you can make an argument here upon the facts pleaded and proved, that Mr. Nixon died within the term for which this policy was good, on account of the amount

that he did pay, you can have the benefit of any provision of the laws of California which are applicable to the case. My understanding of the case at the present time, however, is that there is nothing in this point at all. The single issue here to determine is whether the premium was paid or not.

Mr. Relfe—Will your Honor give us an exception?

The Court—An exception is allowed. Proceed with the defense.

And thereupon defendant offered testimony as follows:

Mr. William M. Fleming, called as a witness for the defendant, and having been duly sworn, testified:

EXAMINATION-IN-CHIEF BY MR. FOX.

Q. Mr. Fleming, where did you reside, and what was your business in and during the month of September, 1890?

A. I was Special Agent for The Pacific Mutual, living in Tacoma at the time.

Q. And Special Agent for Tacoma?

A. Well, Tacoma and the surrounding country.

Q. State whether or not at any time in or during the month of September, 1889, and if so, as nearly as you can, at what time in the month you saw Mr. Thomas Lea Nixon and had any conversation with him in reference to this policy in suit?

A. It was a few days, I think possibly a week or two after the premium became due; I was in his office one day talking with him; I knew the gentleman by sight—

The Court—You have not been asked to state the conversation.

Q. Now, you say you did have such a conversation ?

A. Yes.

Q. In his office within a week or two after the premium became due.

A. Yes.

Q. Now, I will ask you to state what that conversation was ?

Mr. Relfe—We object to that.

The Court—I sustain the objection.

Mr. Fox—I now offer to prove by this witness that within the thirty days after the premium fell due, within the days of grace allowed, this witness, an agent of the company, called on Mr. Nixon and had a conversation with him at his office, in which Mr. Nixon stated that he did not intend to pay this premium, but proposed to let the policy lapse.

Mr. Relfe—We object on the ground that it is immaterial and irrelevant, and this witness being an Agent of the defendant corporation, and Mr. Nixon being now dead, witness cannot be permitted or allowed to testify to anything that took place between him and Mr. Nixon.

Mr. Fox—I will state that witness is not now an Agent of the company.

Mr. Relfe—We want to add to that the further objection that the premium has been paid by Mrs. Nixon and accepted by the company .

The Court—I will sustain the objection on the ground that I consider the testimony irrelevant.

Mr. Fox—We will save an exception.

The Court—Exception allowed.

Examination of Mr. Fleming closed.

Mr. Edward C. Frost, re-called on behalf of defendant, testified :

EXAMINATION-IN-CHIEF, BY MR. FOX.

Q. I call your attention to the receipt which was submitted to you yesterday, and which is marked "Plaintiff's Exhibit B," and which is dated, October, 31st, 1890, and ask you from whom you received that money ?

A. From the Paying Teller, of Ladd & Tilton.

Q. State whether or not, you did on the same day, communicate with Mr. Nixon on that subject, and if so, how ?

Mr. Relfe—That is objected to, as leading, irrelevant and immaterial.

The Court—Objection overruled.

A. I did.

Q. How ?

A. By letter.

Q. Addressed to Mr. Nixon ?

A. Addressed to Mr. Nixon.

Mr. Fox—Have you that letter ?

Mr. Relfe—I think not. We will waive the production of the original, if you have a copy.

Q. Have you a letter press copy of the original ?

A. Yes, sir.

Q. I will ask you to turn to it.

Mr. Relfe—I would like to ask the witness one question : Whatever that letter is, it was written after the receipt of the money by you, as agent of the company, was it not ?

The Witness—Yes, sir.

Letter press copy handed to counsel.

Q. This, as I understand you, was written on the same day, and at the same time as the receipt of that money, and is a part of the same transaction ?

A. Yes, sir ; at the immediate time.

Mr Relfe—The question is objected to, as leading and improper, and I move to strike out the answer.

The Court—Let it be stricken out.

Q. How long after the receipt of the money was it when you wrote that letter to Mr. Nixon ?

Mr. Carroll—That is objected to as immaterial.

The Court—I overrule the objection.

A. Immediately.

Q. And when written, what did you do with it ?

A. Mailed it to Mr. Nixon.

Q. Well, how mailed it ?

A. Mailed it through the regular channel, the Post Office.

Q. Postage paid ?

A. Postage paid; yes, sir.

Mr. Fox—Counsel waive the production of the original, if your Honor please, and I offer this letter press copy of it in lieu of it, in evidence.

Mr. Relfe—Waiving that, we object to the introduction of that letter in evidence, because it is irrelevant, incompetent and immaterial ; because, also, Mr. Nixon is now dead, and this witness is not competent to testify to any transactions or communications between them, and because the contents of the letter undertake to establish *ex parte*) on the part of the defendant, a different state of facts, which we are unable to meet on account of the death of Mr. Nixon.

Q. I will ask the witness one other question: When you received that money and wrote that letter what knowledge had you as to who had sent the money?

Mr. Relfe—We object.

Q. I will put a more direct question. Had you any information that it was sent by Mrs. Nixon and not by Mr. Nixon?

Mr. Relfe—We object to that as immaterial and irrelevant.

The Court—I overrule the objection.

Mr. Relfe—We ask for an exception.

The Court—Exception allowed.

A. Yes sir; I had knowledge that Mr. Nixon did not desire to continue the insurance.

Mr. Relfe—That is not responsive to the question. We move to strike out the answer.

The Court—Let the answer be stricken out.

Q. The question is, did you have any knowledge as to who sent the money?

A. Not direct knowledge; no, sir.

Mr. Fox—The receipt shows on its face that it was sent on account of the Thomas Lea Nixon policy.

The Court—The objections to the receipt of this letter in evidence are overruled.

Mr. Relfe—We ask for an exception.

The Court—Exception allowed.

Mr. Fox—This being a letter press copy I will ask to read it, and let the reporter write it down; so that we need not follow the copy. It is dated October 31st, 1890. Thomas L. Nixon, Esq., Tacoma, Washington. Dear Sir: I have this day received, through Messrs.

Ladd & Tilton, the sum of $517.80, which I hold in trust for you. Kindly have the enclosed blank properly filled out by yourself and Dr. McCoy, or Dr. Allen, and return to this office, on which they will be submitted to the company, and if approved I will receive the amount as payment of second annual premium due September 1st and now lapsed for non-payment, and send you company's receipt for same. Yours Very Truly, Edward C. Frost."

Q. What blanks were enclosed in that, Mr. Frost?

A. Two blanks, and one—

Mr. Relfe—We object to that as irrelevant and immaterial.

The Court—I will overrule the objection.

Mr. Relfe—We take an exception.

The Court—Exception allowed.

A. One which required Mr. Nixon's own personal statement that he was then in good health and desired to be reinstated; the second was to be filled out by the medical examiner who made the examination on first application of Mr. Nixon, stating that he was then in perfect health, or in as good health as at the time of the application when the company received it.

Q. State whether or not the request contained in that letter as to having those blanks filled out and returned was ever complied with?

A. No, sir. Several attempts were made and they were never complied with.

Mr. Relfe—Now, I don't know what he means by "several attempts." That is not responsive, and we move to strike it out.

Mr. Fox—We have no objections to striking out that part of the answer.

Q. Was any application ever made through you as the General Agent for the restoration of this policy, and any proof ever offered of good health?

Mr. Relfe—We object to that as immaterial and irrelevant.

The Court—I will overrule the objection.

Mr. Relfe—We ask for an exception.

The Court—An exception is allowed.

A. No, sir, no such return was made.

Q. Now, Mr. Frost, please state to the Court and Jury what was done with the money for which you had given that receipt, and with reference to which you wrote Mr. Nixon on that day?

A. It remained with Messrs. Ladd & Tilton, and was afterwards put to the credit of Mrs. Nixon at her call.

Q. And was never paid to the company?

A. No, sir.

Q. Was notice given of that fact to Mrs. Nixon, and if so, when?

A. Notice was given in a registered letter, enclosing the certificate, which was returned unopened—"Refused by Cora E. Nixon."

Q. When was that notice given?

A. That notice was given May the 1st, 1891.

Q. What next, if anything, was done by way of communicating with her on that subject.

Mr. Relfe—We object, your Honor, because it occurred after the death of Mr. Nixon, and long after this payment was made, and it is irrelevant and immaterial.

The Court—I think this notice in regard to the deposit is relevant. The question that is objected now is a preliminary question.

Q. What next, if anything, was done by way of communicating with her on the subject?

Mr. Relfe—That transaction was the first of May, 1891, half a month after Mr. Nixon's death.

Mr. Fox—I will withdraw that question for the present.

Q. I call your attention to this letter, which has been marked "Defendant's Identification 1." Did you receive that letter?

A. Yes, sir.

Q. About what time?

A. The 23d of December.

Mr. Fox—This is a letter, if your Honor please, which Mrs. Nixon identified yesterday as one written by herself, and sent by herself, to the witness. I now offer it in evidence.

Letter referred to received in evidence, and marked "Defendant's Exhibit 1."

Defendant's Exhibit 1 read to the Jury by Mr. Fox.

Q. Now, did you respond to that letter which has just been read?

A. Yes, sir.

Q. When?

A. This letter was replied to on the 26th day of December, 1890.

Q. Is this letter I hand you the one you refer to?

A. Yes, sir.

Mr. Fox—We offer the letter in evidence.

Mr. Relfe—We object to it as irrelevant and immaterial.

The Court—I overrule the objection.

Mr. Relfe—We ask for an exception.

The Court—Exception allowed.

Letter referred to received in evidence, and marked "Defendant's Exhibit 2."

Defendant's Exhibit 2 read to the Jury by Mr. Fox.

Q. Now, I will ask you, Mr. Fox, what response Mrs. Nixon made, if any, and when?

A. No response to that letter, sir.

Q. No response from her until after his death?

A. No response until after his death, yes.

Q. Now, what in the meantime, then after writing that letter, was done with the money?

A. It remained still in the bank, sir.

Q. And after his death, did you give her any notice then in regard to it?

A. Yes, sir; the money was———

Mr. Relfe—We object. It seems to me that counsel ought to refrain from leading the witness.

The Court—I will overrule the objection.

A. The money was deposited to the order of Mrs. Nixon, at Ladd & Tilton's Bank, and instructions were sent her to that effect.

Q. By whom?

A. By myself.

Q. Is that in writing?

A. Yes, sir.

Q Can you turn to that and show us a copy of it, so that we can get the date ?

A. Here is the letter itself, with the certificate.

Q. That is the one you referred to a moment ago as having been sent by registered letter, and returned unopened ?

A. Yes, sir.

Q. I understand you that this was the next communication from you after that letter ?

A. Yes, sir.

Q. Which you wrote in response to hers, of the 22d?

A. Yes, sir.

Mr. Fox—We offer it in evidence.

Mr. Relfe—We object to it as incompetent, irrelevant and immaterial, it never having been received by Mrs. Nixon, or by any body else, as the witness has testified that it was returned to him unopened.

Mr. Fox—Do you admit that that is Mrs. Nixon's signature to the word "Refused" on the envelope ?

Mr. Relfe—We think it is ; it looks like it, yes, sir.

Mr. Fox—I now offer, if your Honor please, the letter of May 1st, 1891, the enclosed certificate of deposit and the envelope in which it was enclosed with original endorsements, the signature of Mrs. Nixon on the envelope being admitted.

Mr. Relfe—We make the objection I stated a moment ago.

The Court—I will overrule the objection.

Mr. Relfe—We except.

The Court—Exception allowed.

Papers referred to, letter, certificate of deposit and

envelope received in evidence, and marked "Defendant's Exhibit "3," and read to the jury by Mr. Fox.

Following is an exact copy of the certificate of deposit just referred to, made by order of the Court, and substituted for the original:

"Ladd & Tilton, Bankers, No. 73,673.

X 517 X Portland, Oregon, May 1st, 1891.

E. C. Frost has deposited in this bank, five hundred seventeen .80 dollars, payable to Mrs. T. L. Nixon, $517.80, or order, upon presentation of this certificate properly endorsed.

N. C. Strong, Teller. LADD & TILTON.

Not subject to check."

Q. It seems you wrote a letter prior to this, in April?

A. Yes, sir.

Q. Will you turn to that letter?

A. I have not got a copy of it here. This book does not run as far as that.

Mr. Fox—I think I have a copy of it here, but there is no signature to it.

Q. I will ask you if the paper I hand you is a carbon copy of the letter you sent?

Mr. Carroll—We have the original of that letter here.

Letter referred to by Mr. Carroll handed to witness.

Q. Is that the letter you sent?

A. That is the one I sent; yes, sir.

Q. That is the one you sent the day before you sent the registered letter?

A. Yes, sir.

Mr. Fox—I will offer that letter in evidence.

Letter received in evidence and marked "Defendant's Exhibit 4."

Q. Now, where is that money?

A. It is in Ladd & Tilton's bank.

Q. Still on deposit, as you left it?

A. Still on depost; yes, sir.

Mr. Fox—The witness with you, gentlemen.

Mr. Relfe—It is a little out of order, your Honor, but I will now offer in evidence the letter of October 23d, with the envelope, which is addressed to Thomas L. Nixon, Esq., which we offered yesterday.

The Court—It will be admitted.

Letter referred to received in evidence, and marked "Plaintiff's Exhibit C," and envelope, the same.

Exhibit C, read to the jury by Mr. Relfe.

Cross-Examination by Mr. Relfe.

Q. Mr. Frost, did Mrs. Nixon authorize you to deposit that money in the bank?

A. No, sir.

Q. Did Mr. Nixon?

A. No, sir.

Q. You did that on your own motion, then?

A. Yes, sir.

Q. You received that money on the 31st of October, 1890?

A. Yes, sir.

Q. And signed that receipt, which is Exhibit B?

A. Yes, sir.

Q. When you received that money you knew what it was sent for, did you not?

A. Yes, sir.

Q. You knew it was sent to be applied as per the telegram, in payment of Mr. Nixon's premium on that policy?

A. Yes, sir.

Q. Did Mr. Nixon or Mrs. Nixon at any time conceive or assent to your acting as trustee for them and holding that money?

Mr. Fox—We object to that as irrelevant, andi mmaterial; and the correspondence shows that he never had it in that way.

The Court—I think the question is calculated to elicit from the witness a legal argument, not asking him what was said and done as a matter of fact, but whether they consented to his acting as a trustee or not, which is a legal conclusion that lawyers might disagree about.

Mr. Relfe—I asked him whether they at any time or in any way assented to that trusteeship of his?

Mr. Fox—I object to that as incompetent and inadmissible and tending to draw a conclusion.

The Court—I sustain the objection.

Mr. Relfe—We except.

The Court—Exception allowed.

Q. Did either of them ever write to you or tell you that you might hold that money as trustee?

Mr. Fox—I object to that. What response did they make to the letter in which you informed them that you held it in trust, is, I think the question.

The Court—I overrule the objection.

Mr. Fox—We ask for an exception.

The Court—Exception allowed.

Question read: Did either of them ever write to you or tell you that you might hold that money as trustee?

A. They wrote to me, but they did not tell me that I might hold it as trustee.

Q. Now, answer the question, Mr. Frost?

A. Well, they did not tell me that I might hold it as trustee. You asked me "Did they write to me?" Yes, they did but they did not tell me I might hold it as trustee.

Q. Did they ever, directly or indirectly, authorize you to do anything with that money except to apply it on that premium?

Mr. Fox—That is objected to as incompetent and immaterial.

The Court—I sustain the objection.

Q. Now, you say, Mr. Frost, in answer to the counsel's questions, that the money was received by you on the 31st, and then deposited on that day in the bank. Am I correct in my recollection?

A. Yes, sir.

Q. In Ladd & Tilton's bank?

A. Yes, sir.

Q. Deposited by you?

A. Yes, sir.

Q. And to whose credit?

A. It was deposited to the credit of my account there.

Q. To the credit of your account as general agent?

A. Yes.

Q. Then it remained in that condition until the date of the registered letter, did it not?

A. Yes, sir.

Q. At the time you undertook to transmit it by registry?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. It remained in that condition until the date of that registered letter?

A. Yes, sir.

Q. An then you undertook to send it to her by a registered letter and she declined to receive it, and on the 30th of April you deposited it to her credit?

A. Yes, sir.

Q. The 30th of April, 1891?

A. Yes, sir.

Q. That was the first time that money was ever put to her credit in the Bank of Portland, was it not?

A. Yes, sir.

Q. That was after Mr. Nixon's death?

A. Yes, sir.

Q. Do you remember your testimony a moment ago, Mr. Frost, wherein you spoke of several attempts to do something? I will have to ask you in that way, as I do not remember, myself exactly. Do you remember that expression of yours?

A. Yes.

Q. What did you mean by that? Did you mean that you had made several attempts, or that Mr. Nixon had made several attempts?

A. That several attempts had been made. Dr. McCoy had sent——

Q. (Interrupting) I want to know whether the expression that several attempts had been made referred to your own acts in trying to get him a health certificate, or to Mr. Nixon's acts ?

A. Well, it was to neither particularly.

Q. How long have you been General Agent for The Pacific Mutual Life ?

A. A little over four years.

Q. From now, you mean ?

A. Yes, sir; it was in June, 1888, that, I believe, I first took the agency.

Q. What was your territory ?

A. At what time, sir ?

Q. Well, as General Agent, I mean ?

A. Well, at what time ?

Q. Well, during that period.

A. First I had the general agency for part of Oregon, then it was increased to Oregon and this Puget Sound District; finally I had the agency for the whole of Washington and Oregon.

Q. What was the extent of your jurisdiction in September and October, 1890 ?

A. Oregon and Puget Sound.

Q. What literature did you keep—what company literature did you keep in your office in the general transaction of your business; or did you at that time as General Agent.

Mr. Fox—That is objected to as immaterial and irrelevant.

The Court—Do you propose to connect it and make it relevant to something he has testified to in chief?

Mr. Relfe—I propose to show its relevancy by reference to his scope of authority as General Agent.

The Witness—May I be allowed to make a remark in regard to the general agency?

The Court—Not at present, no, sir. I will sustain the objection.

Mr. Relfe—We except.

The Court—An exception is allowed.

Q. You collected and receipted for the first premium in this case, did you not?

A. Yes, sir.

Q. Did your business as General Agent include the delivery of the policies after the contract had been agreed upon?

A. Yes, sir.

Q. And the giving of the premium receipts?

A. Yes, sir.

Q. And collecting the premiums?

A. Yes, sir.

Q. Did it include also adjusting death losses, or is that another department?

Mr. Fox—It seems to me that this is not relevant, and that it is not proper cross-examination, and I object on those grounds.

The Court—I will sustain the objection.

Mr. Relfe—We except.

The Court—Exception allowed.

Q. Mr. Frost, when you received the first premium

from Mr. Nixon, of $517.80, were you then at Portland?

A. No, sir.

Q. Where?

A. Here.

Q. Were you General Agent then?

A. General Agent; yes, sir.

Q. Well, what did you do with that premium?

Mr. Fox—I object; it is irrelevant and immaterial.

The Court—I sustain the objection.

Mr. Relfe—We will except. I think this is competent to show his course of business.

The Court—Exception allowed.

Q. In September and October, 1890, were you in the habit of receiving premiums on policies?

A. Yes, sir.

Q. Within your jurisdiction?

A. Yes, sir.

Q. What did you do with those moneys, including those premiums?

Mr. Fox—That is objected to as immaterial,

The Court—I sustain the objection.

Mr. Relfe—We except.

The Court—Exception allowed.

Q. I will ask you the further question, whether you deposited them in bank to your account as General Agent.

Mr. Fox—We object on the same grounds.

The Court—I sustain the objection.

Mr. Relfe—We except.

The Court—Exception allowed.

Q. Did you have periodical settlements with the company, as to the business transacted for it, and the moneys received and disbursed ?

Mr. Fox—We object to that ; it is irrelevant and immaterial.

The Court—I overrule the objection.

Mr. Fox—We ask an exception.

The Court—Exception allowed.

A. I had.

Q. What are those periods—quarterly or monthly ?

A. Monthly.

Q. Then you struck your balance, and remitted the balance in your hands to the company, did you, for those monthly periods ?

A. No, sir ; not as I understand your question.

Question read—"Then you struck your balance, and remitted the balance in your hands of the company, did you, for those monthly periods ?"

A. No, sir.

Q. What did you do then ?

A. I make them a statement and remit them the balance due them.

Q. That is what I ask you.

A. I beg pardon. I understand you the balance of money that is in the bank.

Q. No, of course, you would not remit anything of your own?

A. No, sir.

Q. That is what I meant, that you remitted them

the balance shown to be due them as general agent, receipts over disbursements?

A. Yes, sir.

Y. Did you deliver this policy to Mr. Nixon, or was it done through your office?

A. Yes, it was done through my office; I think I done it personally.

Q. How?

A. To the best of my recollection I did it personally.

Q. When and where?

Mr. Fox—That is objected to as irrelevant, and further that there is no dispute about that.

The Court—I sustain the objection.

Mr. Relfe—I would like to say that I asked the question for this purpose only: it is pleaded here, while it is a legal conclusion, that this is a California contract, that may or may not cut any figure in this case; I do not know as to that, but we are entitled to find out where the policy was delivered, and it was with that view that I asked the question.

The Court—I will sustain the objection on the ground that it is not cross-examination. It may be that you have a right to prove that fact if you call your own witnesses for the purpose.

Mr. Relfe—That is all.

Re-Direct Examination by Mr. Fox.

Q. In your reports and settlements with the company was this premium, this money, received on the 31st day of October, 1890, ever accounted for to the company in any way?

Mr. Relfe—We object to that as incompetent, irrelevant and immaterial.

The Court—I will overrule the objection.

Mr. Relfe—We except.

The Court—Exception allowed.

A. No, sir, it was not.

Q. If I understand you correctly, it was held by you from the 31st day of October, when it was paid and deposited in bank to the credit of your account, and staid in that shape until the 31st of April, 1891, at the time of his death, under the correspondence which you have had with Mr. Nixon and Mrs. Nixon, and which has already been offered in evidence?

Mr. Relfe—We object to the form of the question.

The Court—Objection overruled.

A. Yes, sir.

Mr. Fox—That is all.

Mr. Relfe—That is all.

Examination of Mr. Frost recalled closed.

Mr. Fox—I now offer in evidence, if your Honor please, the application for this policy of insurance, which was identified by Mrs. Nixon yesterday. I wish to have it marked as an exhibit and considered as read to the jury.

Paper referred to received in evidence and marked "Defendant's Exhibit 5."

Mr. Fox—I have a certified copy of Exhibit 5 here, which I desire to substitute in place of the original, and withdraw the original from the record.

The Court—Very well.

Mr. Fox—I believe that is the defendant's case, your Honor.

Defendant rests.

The Court.—We will now take a recess until 1:45 this afternoon.

Gentlemen of the Jury, keep in mind the admonition I gave you when you were first allowed to separate.

Tacoma, Wash., 1:45 p. m.
September, 28, 1892.

All present proceedings continued, pursuant to adjournment.

The Court—Do you wish to offer any testimony in rebuttal.

Mr. Relfe—We have no further testimony, your Honor.

The Court—Proceed with the argument of the case to the jury.

Case argued to the jury by Mr. Carroll for the plaintiff, and Mr. Fogg and Mr. Fox for the defendant, Mr. Relfe closing for the plaintiff.

Before the commencement of the argument to the jury, Mr. Fox, on behalf of the defendant, submitted :

Requests of defendant to charge jury, as follows :

1. This is an action upon a contract of life insurance, and brought for the purpose of recovering the amount of the insurance named in the policy. The contract is in writing, and upon its face shows that it is in two parts, to-wit: One part known as, and called Application for Life Insurance, and the other part being known as, and called a Policy of Life Insurance. There is no dispute in this cause as to the fact of a policy of life insurance having

been issued and granted, insuring the life of Thomas Lea Nixon, in the sum of ten thousand dollars, nor is it disputed that said Thomas Lea Nixon died on the 16th day of April, 1891, and that his widow, the plaintiff in this cause, is entitled to recover the amount of the insurance, provided the contract of insurance was in force at the date of his death.

(Note by the Court: "Given.")

2. The application for insurance was written and signed in this State, and was made by said Thomas Lea Nixon, dated August, 15th, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the 1st day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in San Francisco, in that State; and the application provided upon its face, that if the proposition for life insurance therein contained, should be accepted, and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted, and the policy issued and made in San Francisco, in the State of California, and bore date, September, 1st, 1889, and by the terms of the contract itself became and was a California contract, and the rights of the parties thereunder, were governed by the terms of the contract and the laws of the State of California.

(Note by the Court: "Refused.")

3. The contract further provides upon its face, that if a policy should be issued upon the application, it should become null and void, if the premium thereon was not paid as provided therein, and should such policy become null and void by reason of the non-payment of the premium, all payments previously made should be forfeited to the company, except as in the policy otherwise provided. This provision of the contract was, and is, expressly stated and declared in the first part thereof, to-wit: in the application made and signed by the insured, Thomas Lea Nixon.

(Note by the Court: "Given.")

4. It was further provided in this application for insurance, and became a part of the contract, that all the declarations, agreements and warranties therein contained should constitute a part of the contract and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face that it was made in consideration of the representations made in the application therefore and the agreements therein contained, which application is made a part of the contract; and of said sum of five hundred seventeen and .80, and the annual payment of a like amount to be paid on or before 12 o'clock noon, on the 1st day of September in every year during the continuance of the policy.

(Note by the Court: "Refused.")

5. It was further provided in and upon the face of said policy that after the payment of the first premium, a grace of thirty days for the payment of the premium

should be allowed, but only in case the same is paid during the lifetime of the insured aforesaid; also, that no alteration or waiver of the conditions of the policy should be valid unless made at the office of said company in San Francisco, and signed by the President or Vice-President, Secretary or Assistant Secretary.

(Note by the Court: "Given.")

6. It is admitted that the contract of insurance was duly made and executed, containing all of the provisions hereinbefore stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is as to whether or not the second premium which fell due on the 1st day of September, 1890, was paid according to the terms of the policy or contract.

(Note by the Court. "Refused.")

7. If you should find from the evidence that it was so paid and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy in that behalf on his part, then you will find for the plaintiff; but, on the other hand, if you find from the evidence that the premium which fell due on the 1st day of September, 1890, was not paid on or before 12 o'clock of that day, or within the thirty days grace, to-wit: The next succeeding thirty days thereafter, according to the terms of the policy and within the lifetime of the insured, then it is your duty to find for the defendant.

(Note by the Court: "Refused.")

8. I charge you that under the law of the contract, to-wit: The statutes and the laws of California, the provision made in this contract for prompt payment of the

premium when due was a warranty that the premium should be so paid and that a failure of this provision rendered the contract void under the statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it became of the essence of the contract and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract and sickness or disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment.

(Note by the Court—"Refused.")

9. If there was a failure to pay this premium within the time fixed by the contract, it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid, would operate to renew the policy; even the act of a person holding an agency of this plaintiff in receiving, receipting for and temporarily retaining the amount of the premium past due, and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon.

(Note by the Court—"Refused.")

At the close of the argument the Court charged the Jury as follows:

The Court—Gentlemen of the Jury, this is an action upon a contract of life insurance, and brought for the

purpose of recovering the amount of insurance named in the policy. The contract is in writing, and upon its face shows that it is in two parts, to-wit: One part known as and called "Application for Life Insurance," the other part being known as and called "Policy of Life Insurance." There is no dispute in this cause as to the fact of a policy of life insurance having been issued and granted, insuring the life of Thomas Lea Nixon in the sum of ten thousand dollars; nor is it disputed that said Thomas Lea Nixon died on the 16th day of April, 1891, and that his widow, the plaintiff in this cause, is entitled to recover the amount of insurance, provided the contract of life insurance was in force at the date of his death. The contract provides upon its face that if a policy should be issued on the application it should become null and void if the premium thereon was not paid as provided therein, and should such policy become null and void by reason of the non-payment of any premium, all payments previously made should be forfeited to the company, except as in the policy otherwise provided. This provision of the contract was and is expressly stated and declared in the first part hereof, to-wit: in the application made and signed by the insured, Thomas Lea Nixon. It was further provided in and upon the face of said policy, that after the payment of the first premium, a grace of thirty days for the payment of the premium should be allowed, but only in case the same is paid during the lifetime of the insured. Also that no alteration or waiver of the conditions of the policy should be valid, unless made at the office of said company in San Francisco, and signed by the President or Vice-President, Secretary or Assistant Secretary. It

is admitted that the contract of life insurance was duly made and executed, containing all the provisions herein before stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is as to whether or not the second premium, which fell due on the first day of September, 1890, was paid. That, gentlemen of the jury, is the disputed question between the parties to this case — whether the second premium was paid or not. It is a question which you have to decide, and as you decide it, one way or the other, your verdict will be for or against the plaintiff in the case. You are the exclusive judges of every question of fact, and you are to determine the case, decide this question and determine the case, according as you find the facts to be from the evidence under the instructions of the Court as to the law which is to be applied to the facts as you find them.

Now, in determining this main question of fact you are to keep in mind that the burden rests upon the plaintiff to prove that she did pay this second premium, and the fact of payment cannot be found from mere inferences, but it must appear from the testimony; and you must find from a fair preponderance of the evidence in her favor, that she actually did pay the money, in order to warrant a verdict for the plaintiff. She cannot hold this company liable upon any promise of an agent of the company to accept anything except actual cash, the full amount due within the stipulated time of the contract; but under the issues as they are framed she must prove that she actually paid the money and that the company got it.

Under the terms of the contract and the law of the case the time when the money was due is a material part of the contract which the company has a right to insist upon; and no tender or offer of payment after the lapse of that time would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted. But an actual payment of the money, so that the full amount was received by the company, when paid by the plaintiff in the case, is a payment of that premium; and if received and retained by the company would be exactly equivalent to payment within the period provided within the contract when it should have been paid. In other words, a payment is as much a payment made after the date when it was due and payable, provided it was received and retained by the company, as if it had been made before that time.

Now, Mr. Frost appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company will be regarded as the act of the company.

Acts of his, unauthorized and outside of the scope of his autharity as an agent of the company are not binding upon the company, unless he assumes to act for the company and the company knew of his action and received and retained the benefit of his action and failed promptly to give notice to the plaintiff that his act was not indorsed or approved by the company. If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to

notify the plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received it, then it would be, by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act and may be regarded as the ratification of the action of an agent of the company in a matter in which he was previously unauthorized; and the action of one assuming to be an agent and acting for another, if ratified by the principal, becomes just as binding and has the same effect as if it had been an authorized act at the time.

If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If, however, being unauthorized, he simply retained the money temporarily and promptly notified the plaintiff that it had not been applied in payment of the premium, the company would not be bound by his acts in receiving the money. If, however, he retained the money, after being requested or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent for the plaintiff would be unwarranted, and in so far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect.

Under the peculiar conditions of this case it is one in

which promptness and actual good faith was required on both sides. It was required of Mr. Frost, if he did not intend to apply the money he received in payment of this premium to make the policy good that he should give prompt notice; if he did not give prompt notice it was incumbent upon Mr. Nixon or Mrs. Nixon to act definitely in the matter of furnishing the additional certificates that were required, or notify him that they could not or would not furnish them, and call for their money to be returned, and if they did so notify Mr. Frost and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was acting as a trustee or agent for the plaintiff in holding the money, but it will be regarded as money received and retained by the company and bind them to make an application of it as a payment in accordance with the original intention and instruction of the plaintiff in sending it.

Now, it is for you to take into account the testimony, the letters and correspondence, which have been introduced, and decide what effect to give to this evidence, and determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company declined to receive it as payment; and as you decide that question you will make up your verdict for or against the plaintiff.

Gentlemen of the jury, in case you find a verdict for the plaintiff she will be entitled to the amount of the policy, ten thousand dollars, with interest to be computed at the rate of seven per cent per annum from the time

when the company received information that Mr. Nixon was dead,—from the time that you find the company had notice of his death. If you find a verdict for the defendant you have no question to consider as to the amount, you simply find for the defendant.

I have prepared the form of a verdict for you. It is not complete, and after you have decided the case you will complete it by the adoption of one or the other of the forms I have submitted on this separate slip of paper. It requires to be signed by whoever you select from your number to be foreman of the jury. If the Court is not in session at the time you agree upon your verdict you will have the verdict completed, signed by your foreman, placed in an envelope and sealed up and leave it in the possession of your foreman. You may then separate, but come together again when the Court next convenes so as to be all present when the verdict is returned into Court. In case you do separate before returning the verdict into Court you will not communicate to any one or allow any one to make inquiries of you as to the result of the case, but let your announcement of your verdict be first made in Court when the verdict is read.

You may retire with the bailiff, gentlemen.

The jury having retired, thereupon.

Mr. Relfe—If the Court please, we desire to save an exception to that portion of the charge which declares that the burden of proof of payment is on the plaintiff.

The Court—Exception allowed.

STATE OF WASHINGTON, } ss.
County of Pierce. }

I, Charles E. Eaton, stenographer, do hereby certify that I attended at the trial of the above entitled action, as stenographer, having been duly sworn in as such, and reported in shorthand the testimony and proceedings during said trial ; that the foregoing, consisting of sixty-three (63) typewritten pages, is a full, true and correct transcript of my notes taken on said trial; that said transcript embraces and contains a full and complete report of the testimony produced and proceedings had on said trial, together with the objections of counsel, the rulings of the Court thereon, and exceptions taken and allowed thereto, and the charge of the Court to the jury.

In witness whereof, I have hereunto set my hand at the City of Tacoma, in the County and State aforesaid, this 3rd day of October, A. D. 1892.

C. B. EATON.

— —

And, afterwards, to-wit : On the 13th day of December, 1892, there was duly filed in said Court, in said cause, the copy of the Exhibit No. 3, of the Defendant, substituted for the original, in the words and figures as follows, to-wit :

TACOMA, Oct. 6, 1892.

Rec'd of C. B. Eaton the certificate of deposit introduced in evidence, in case of Cora E. Nixon vs. Pacific Mutual Life Ins. Co., in the Circuit Court of the U. S.

Said certificate being dated, May 1, 1891, for $517.80, to E. C. Frost, and issued by Ladd & Tilton of Portland.

DOOLITTLE & FOGG.

Same being Defendant's Exhibit 3.

Certificate of Deposit.

Ladd & Tilton, Bankers, No. 73,673.

X 517 X. Portland, Oregon, May 1, 1891.

E. C. Frost has deposited in this Bank, five hundred seventeen .80 dollars, payable to Mrs. T. L. Nixon, $517.80, or order, upon presentation of this certificate, properly endorsed.

N. C. Strong, Teller. Ladd & Tilton.

Not subject to check.

I hereby certify, that the above is an exact copy of Defendant's Exhibit 3, offered and received in evidence in case of Nixon vs. Pacific Mutual Life Insurance Company.

C. B. Eaton,
Stenographer.

And, afterwards, to-wit: On the 28th day of December, 1892, there was duly filed in said Court, in said cause, The Assignment of Errors of the Defendant, in the words and figures as follows, to-wit:

In the United States Circuit Court of Appeals, for the Ninth District.

Cora E. Nixon,
Plaintiff,

vs.

The Pacific Mutual Life Insurance Company of California,
Defendant.

Assignment of Errors.

Comes now, the defendant in the above entitled action,

by its attorneys, and says: that in the record and proceedings in the above entitled action, there is manifest error, in this:

I.

The Court erred in admitting evidence the policy of insurance in this case, for the reason, that the contract of insurance herein sued on, was in two parts, neither of which disclosed the entire contract, but both parts are necessary, and required to show the entire contract.

II.

The Court erred in not sustaining defendant's motion for a non-suit made at the close of the plaintiff's evidence, for the reason that there was no evidence then in the record upon which the jury could find a verdict for plaintiff.

III.

The Court erred in sustaining objections to the questions propounded to the witness for the defendant, William M. Fleming; as to a conversation between him and Thomas Lea Nixon.

IV.

The Court erred in refusing to permit the defendant to prove by said witness that within thirty days after the premium fell due, within the days of grace allowed, the witness, then an agent of the company, called on Mr. Nixon and had a conference with him in his office, in which Mr. Nixon stated that he did not intend to pay the premium, but proposed to let the policy lapse.

V.

The Court erred in permitting plaintiff's counsel to introduce in evidence the alleged letter of date October 23, 1890, purported to have been written by Edward C. Frost to Thomas Lea Nixon, for the reason that the same was in no wise identified, and, on the contrary, was in all respects expressly repudiated by the said Edward C. Frost, the person who purported to have written the same.

VI.

The Court erred in permitting plaintiff's counsel to make statements in his closing argument to the jury, not warranted by the evidence and calculated to prejudice and inflame the minds of the jury against the defendant, and to appeal to the sympathy of the jury on behalf of the plaintiff, which remarks were calculated to and did prevent defendant from having a fair trial.

VII.

The Court erred in refusing to give to the jury the following instructions as prayed by defendant:

"The application for insurance was written and signed in this State and was made by said Thomas Lea Nixon, dated August 15, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the 1st day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Campany of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in

San Francisco, in that State; and the application provided upon its face that if the propositions for life insurance therein contained should be accepted and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted and the policy issued and made in San Francisco, in the State of California, and bore date September 1st, 1889, and by the terms of the contract itself became and was a California contract, and the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California."

VIII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"It was further provided in this application for insurance, and became a part of the contract, that all the declarations, agreements and warranties therein contained shall constitute a part of the contract, and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face that it was made in consideration of the representations made in the application therefor, and the agreements therein contained, which application is made a part of the contract; and of said sum of five hundred seventeen and 80-100 and the annual payment of a like amount to be paid on or before 12 o'clock noon, on the 1st day of September in every year during the continuance of the policy."

IX.

The Court erred in refusing to give to the Jury the following instruction, as prayed by defendant:—

"It is admitted that the contract of insurance was duly made and executed, containing all of the provisions hereinbefore stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is as to whether or not the second premium, which fell due on the first day of September, 1890, was paid according to the terms of the policy or contract."

X.

The Court erred in refusing to give to the Jury the following instruction, as prayed by defendant:—

"If you should find from the evidence that it was so paid, and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy on that behalf on his part, then you will find for the plaintiff; but on the other hand, if you find from the evidence that the premium which fell due on the 1st day of September, 1890, was not paid on or before 12 o'clock of that day, or within the thirty days grace, to-wit: the next succeeding thirty days thereafter, according to the terms of the policy and within the lifetime of the insured, then it is your duty to find for the defendant."

XI.

The Court erred in refusing to give to the Jury the following instructions as prayed by the defendant:—

"I charge you that under the law of the contract, to-wit: the Statutes and the Laws of California, the provision

made in this contract for prompt payment of the premium when due was a warranty that the premium should be so paid, and that a failure of this provision rendered the contract void under the Statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it became of the essence of the contract, and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract, and sickness or disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment."

XII.

The Court erred in refusing to give to the Jury the following instruction, as prayed by defendant:—

"If there was a failure to pay this premium within the time fixed by the contract it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid, would operate to renew the policy, even the act of a person holding an ageny of this plaintiff in receiving, receipting for and temporarily retaining the amount of the premium, past due and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon."

XIII.

The Court erred in charging and instructing the Jury as follows, to-wit:

"And the only issue in this case is, as to whether or not the second premium, which fell due on the first day of September, 1890, was paid."

And the Court further charged and instructed the Jury: "She cannot hold this company liable on any promise of an agent of the company to accept anything except actual cash in full payment due within the time stipulated in the contract, but under the issues as they are formed she must prove that she actually paid the money and that the company got it."

And the Court further charged and instructed the jury that "under the terms of the contract and the law of the case, the time when the money was due is a material part of the contract which the company had a right to insist upon and no tender of payment or offer of payment after the lapse of the time would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted."

And thereupon the Court further instructed and charged the jury as follows:—"but an actual payment of the money so that the full amount was received by the company when paid by the plaintiff in this case is a payment of that premium; and if received and retained by the company would be exactly equivalent to payment within the period provided in the contract when it should have been paid. In other words, a payment is as much a payment made after the date when it was due and pay-

able, provided it was received and retained by the company, as if it had been made before that time."

To which charge of the Court to the jury the defendant then and there duly excepted, and exception allowed by the Court.

XIV.

The Court erred in charging and instructing the jury as follows, to-wit: "Now, Mr. Frost, appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company will be regarded as the act of the company. Acts of his, unauthorized and outside of the scope of his authority as an agent of the company, are not binding upon the company, unless he assumed to act for the company and the company knew of his action and received and retained the benefit of his action, and failed promptly to give notice to the plaintiff that his act was not indorsed or approved by the company."

To which ruling the defendant then and there duly excepted, and exception allowed by the Court.

XV.

The Court erred in charging and instructing the jury as follows: "If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to notify the plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received

it, then it would be by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act and be regarded as the ratification of the action of the agent of the company in a matter in which he was previously unauthorized."

To which charge of the Court to the said jury, the defendant then and there excepted and exception allowed by the Court.

XVI

The Court erred in charging and instructing the jury as follows, to-wit: "If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose than as a payment on the policy as the second premium, according to the instructions sent with the money. If however, being unauthorized, he simply retained the money temporarily and promptly notified the plaintiff that it had not been applied in payment of the premium the company would not be bound by his act in receiving the money. If, however, he retained the money, after being requested, or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent of the plaintiff would be unwarranted, and, as far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect."

To which instruction and charge of the Court to the

jury, the defendant then and there duly excepted and exception allowed by the Court.

XVII.

The Court erred in charging and instructing the jury, as follows:

"Under the particular condition of this case, it is one in which promptness and actual good faith was required on both sides. It was required of Mr. Frost, if he did not intend to apply the money he received in payment of this premium to make the policy good, that he should give prompt notice. If he did give prompt notice, it was incumbent upon Mr. Nixon, or Mrs. Nixon, to act definitely in the matter of furnishing the additional certificates that were required, or notify him that they could not or would furnish them, and call for their money to be returned, and if they did not notify Mr. Frost, and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was acting as Trustee or Agent of the plaintiff in holding the money, but it will be regarded as money received and retained by the company, and bind them to make an application of it as a payment in accordance with the original intention and instruction of the plaintiff in sending it."

To which instruction and charge of the Court, the defendant then and there duly excepted, and exception allowed by the Court.

XVIII.

The Court erred in charging and instructing the jury as follows, to-wit:

"Now, it is for you to take into account the testimony, the letters and correspondence that has been introduced, and decide what effect to give to this evidence, to determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company decided to receive it as payment; and as you decide that question, you will make up your verdict for or against the plaintiff."

To which instruction and charge of the Court to the jury, the defendant then and there duly excepted, and exception allowed by the Court.

XIX.

The Court erred in overruling defendant's motion for a new trial herein.

XX.

The Court erred in rendering judgment herein, in favor of the plaintiff and against the defendant.

Wherefore, the defendant, The Pacific Life Insurance Company of California, prays the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, that the judgment of the said Circuit Court of the United States, District of Washington, Western Division may be reversed and held for naught, and that the said defendant may be restored to all things that it has lost by reason thereof.

DOOLITTLE & FOGG,
Attorneys for Defendant.

And afterwards, to-wit: On the 28th day of December, 1892, there was duly filed in said Court in said cause, The Petition of said Defendant for a Writ of Error, in the words and figures as follows, to-wit:—

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Defendant.

To the Honorable C. H. Hanford, District Judge of the United States District Court for the District of Washington, sitting as Circuit Judge of the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

Now comes The Pacific Mutual Life Insurance Company of California, defendant in the above entitled cause, and represents and alleges, that on the 28th day of December, 1892, the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, made and entered a judgment in the above entitled cause in favor of the plaintiff, Cora E. Nixon, against this defendant, The Pacific Mutual Life Insurance Company of California, for the recovery of the sum of ten thousand dollars and interest and the costs of said action.

And your petioner further represents and alleges, that there is manifest error in the record and proceedings of

the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, in the following particulars, to-wit:

I.

The Court erred in admitting evidence the policies of insurance in this case, for the reason that the contract of insurance herein sued on was in two parts, neither of which disclosed the entire contract, but both parties are required to show the entire contract.

II.

The Court erred in not sustaining defendant's motion for a non-suit made at the close of the plaintiff's evidence, for the reason that there was no evidence then in the record upon which the jury could find a verdict for plaintiff.

III.

The Court erred in sustaining objections to the questions propounded to the witness for the defendant, William M. Fleming, as to a conversation between him and Thomas Lea Nixon.

IV.

The Court erred in refusing to permit the defendant to prove by said witness, that within thirty days after the premium fell due, within the days of grace allowed, the witness, then an agent of the company, called on Mr. Nixon and had a conference with him at his office, in which Mr. Nixon stated that he did not intend to pay the premium, but proposed to let the policy lapse.

V.

The Court erred in permitting plaintiff's counsel to introduce in evidence the alleged letter of date October 23, 1890, purported to have been written by Edward C. Frost to Thomas Lea Nixon, for the reason that the same was in no wise identified, and on the contrary was in all respects expressly repudiated by the said Edward C. Frost, the person who purported to have written the same.

VI.

The Court erred in permitting plaintiff's counsel to make statements in his closing argument to the Jury, not warranted by the evidence and calculated to prejudice and inflame the minds of the jury against the defendant, and to appeal to the sympathy of the jury on behalf of the plaintiff, which remarks were calculated to and did prevent defendant from having a fair trial.

VII.

The Court erred in refusing to give to the Jury the following instructions as prayed for by defendant:

"The application for insurance was written and signed in this State, and was made by Thomas Lea Nixon, dated August 15, 1889, and provided that the policy, if one should be issued thereon, should bear date on and run from the first day of September, 1889. This application was addressed to the defendant, The Pacific Mutual Life Insurance Company of California, a corporation organized and existing under the laws of the State of California, and having its principal place of business in San Fran-

cisco, in that State; and the application provided upon its face that if the proposition for Life Insurance therein contained should be accepted and a policy issued thereon, the contract of insurance should be held and construed at all times and places to have been made in the City of San Francisco, in the State of California. The application was accepted and the policy issued and made in San Francisco, in the State of California, and bore date September 1st, 1889, and by the terms of the contract itself, became and was a California contract, and the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California."

VIII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

" It was further provided in this application for insurance, and became a part of the contract, that all the declarations, agreements and warranties therein contained should constitute a part of the contract, and that the application with its declarations, agreements and warranties was offered as a consideration for the policy applied for, the policy itself expressing on its face that it was made in consideration of the representations made in the application therefor and the agreements therein contained, which application is made a part of the contract; and of said sum of five hundred seventeen and 80-100, and the annual payment of a like amount to be paid on or before 12 o'clock, noon, on the 1st day of September in every year during the continuance of the policy."

IX.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"It is admitted that the contract of insurance was duly made and executed, containing all the provisions hereinbefore stated; that the first premium thereon was paid and the policy delivered, and the only issue in this case is, whether or not the second premium which fell due on the first day of September, 1890, was paid according to the terms of the policy or contract."

X.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"If you should find from the evidence that it was so paid, and that the insured, Thomas Lea Nixon, complied with the terms and conditions of the policy in that behalf on his part, then you will find for the plaintiff; but, on the other hand, if you find from the evidence that the premium which fell due on the first day of September, 1890, was not paid on or before 12 o'clock of that day, or within the thirty days grace, to wit: the next succeeding thirty days thereafter, according to the terms of the policy and within the lifetime of the insured, then it is your duty to find for the defendant."

XI.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"I charge you, that under the law of the contract, to wit: the Statutes of the Laws of California, the pro-

visions made in this contract for prompt payment of the premium when due was a warranty that the premium should be paid; and that a failure of this provision rendered the contract void under the Statutes of California, as well as under the provisions of its own terms found on its face. This provision was one which the parties had a right to make, and having made it, it became of the essence of the contract, and was binding upon the contracting parties and upon the beneficiary under the policy. The time within which the payment was to be made was also of the essence of the contract, and sickness and disability would not constitute an excuse for non-payment which operated to defeat the lapse of the policy, or prevent it becoming void for non-payment."

XII.

The Court erred in refusing to give to the jury the following instruction, as prayed by the defendant:

" If there was a failure to pay the premium within the time fixed by the contract it defeats the plaintiff's right to recover in this action; the policy lapsed and became void by reason of that non-payment, and no promise of an agent to accept the premium after the time when it should have been so paid would operate to renew the policy, even the act of a person holding an agency of this plaintiff in receiving, receipting for and temporarily retaining the amount of the premium, past due, and for the non-payment of which the policy had lapsed by its own terms, would not operate as a waiver so as to renew the policy or entitle the plaintiff to recover thereon."

XIII.

The Court erred in charging and instruction the jury as follows, to-wit :

" And the only issue in this case is, as to whether or not the second premium, which fell due on the first day of September, 1890, was paid."

And the Court further charged and instructed the jury:

" She cannot hold this company liable, on any promise of an agent of the company, to accept anything except actual cash in full payment due, within the time stipulated in the contract, but under the issues as they are formed she must prove that she actually paid the money, and that the company got it."

And the Court further charged and instructed the jury that " under the terms of the contract and the law of the case, the time when the money was due is a material part of the contract, which the company had a right to insist upon, and no tender of payment or offer of payment after the lapse of the time, would place her in the same situation that actual payment would place her in, provided the tender was refused or not accepted."

And, thereupon, the Court further instructed and charged the jury as follows: " but an actual payment of the money, so that the full amount was received by the company when paid by the plaintiff in this cause, is a payment of that premium ; and if received and retained by the company, would be exactly equivalent to payment within the period provided in the contract when it should have been paid. On other words, a payment is as much a payment made after the date

when it was due and payable, provided it was received and retained by the company, as if it had been made before that time."

To which charge of the Court to the jury, the defendant then and there duly excepted, and exception allowed by the Court.

XIV.

The Court erred in charging and instructing the jury as follows, to-wit :

"Now, Mr. Frost appears by the pleadings and the evidence to have been acting for this company, and whatever he did within the scope of his authority to represent the company, will be regarded as the act of the company. Acts of his unauthorized and outside of the scope of his authority as an agent of the company, are not binding upon the company, unless he assumed to act for the company and the company knew of his actions and received and retained the benefit of his action, and failed promptly to give notice to the plaintiff that his act was not indorsed or approved of by the company."

To which ruling, the defendant then and there duly excepted, and exception allowed by the Court.

XV.

The Court erred in charging and instructing the jury as follows, to-wit :

"If he received money from the plaintiff for the company which he was not authorized at the time to receive, and yet retained it and applied it to the use of the company, with the knowledge of his superior officers in the company, and if they failed to notify the plaintiff that the

payment was not approved or received by the company, and failed to return the money, if they received it, then it would be by reason of the failure of the company to repudiate his act promptly, equivalent to an authorized act, and be regarded as the ratification of the action of the agent of the company in a matter in which he was previously unauthorized."

To which charge of the Court to the said jury, the defendant then and there duly excepted, and exception allowed by the Court.

XVI.

The Court erred in charging and instructing the jury as follows: to-wit:

"If the plaintiff sent the amount of the second premium on this policy to Mr. Frost at Portland, to be applied as a payment of the second premium on this life insurance policy, Mr. Frost would have no right to receive and retain the money for any other purpose that as a payment on the policy as the second premium, according to the instructions sent with the money. If, however, being unauthorized, he simply retained the money temporarily and promptly notified the plaintiff that it had not been applied in payment of the premium the company would not be bound by his act in receiving the money. If, however, he retained the money, after being requested, or notified by the plaintiff to return it, then his assumption in the matter of acting as trustee or agent of the plaintiff would be unwarranted, and as far as he was acting with the knowledge of the managing officers of the company, would be binding upon them in the same manner as where he acted for the company in any other respect."

To which instruction and charge of the Court to the jury the defendant then and there duly excepted and exception allowed by the Court.

XVII.

The Court erred in charging and instructing the jury as follows, to-wit: "Under the peculiar condition of this case, it is one in which promptness and actual good faith was required on both sides; it was required of Mr. Frost, if he did not intend to apply the money he received in payment of this premium to make the policy good, that he should give prompt notice. If he did give prompt notice it was incumbent upon Mr. Nixon or Mrs. Nixon, to act definitely in the matter of furnishing the additional certificates that were required or notify him that they could not or would not furnish them, and call for their money to be returned, and if they did not notify Mr. Frost and ask for the return of the money, and it was yet retained by Mr. Frost, with the knowledge of his superior officers in the company, then it cannot be insisted that he was acting as trustee or agent of the plaintiff and holding the money, but it will be regarded as money received and retained by the company and bind them to make an application of it as a payment in accordance with the original intention and instruction on the plaintiff in sending it."

To which instruction and charge of the Court the defendant then and there duly excepted, and exception allowed by the Court.

XVIII.

The Court erred in charging and instructing the jury as follows, to-wit :

"Now it is for you to take into account the testimony, the letters and correspondence, that has been introduced, and decide what effect to give to this evidence to determine whether the company received this money or not, and whether it has retained it after it should have returned it, in case the company decided to receive it as payment; and as you decide that question you will make up your verdict for or against the plaintiff."

To which instruction and charge of the Court to the jury the defendant then and there duly excepted, and exception allowed by the Court.

XIX.

The Court erred in overruling defendant's motion for a new trial herein.

XX.

The Court erred in rendering judgment herein, in favor of the plaintiff and against defendant.

All of which errors will more fully appear by the Assignment of Errors in the United States Circuit Court of Appeals, for the Ninth Circuit, which is filed herewith.

Wherefore, your petitioner prays, that a Writ of Error may be allowed to the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, whereby the said final judgment may be removed to the United States Circuit Court of Appeals, for the Ninth Circuit to be there

reviewed and corrected, and that a citation may be issued to the plaintiff, Cora E. Nixon, citing and admonishing her to be and appear before the United States Circuit Court of Appeals, to be holden at the City of San Francisco, in the State of California, within the time required by law and the rules of the said Court, there to show cause, if any there be, why the said judgment of the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, should not be corrected, and that the amount of the bond may be fixed, which will be necessary for your petitioner to give, in order that execution may be stayed on said judgment, and that said Writ of Error may be presented, and that such other proceedings may be allowed as will enable your petitioner to the review of the judgment rendered in the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, by the said United States Circuit Court of Appeals, for the Ninth Circuit, and that said alleged errors may be therein corrected.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Petitioner.

By DOOLITTLE & FOGG,
Its Attorneys.

And, afterwards to-wit: On the 28th day of December, 1892, there was duly filed in said Court in said cause, notice of the plaintiff withdrawing and revoking the stipulation entered into September, 28th, 1892, in the words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, (a corporation),
Defendant.

To Messrs. Doolittle & Fogg and C. N. Fox, Attorneys for the above named defendant.

You are hereby notified and advised that the consent and permission involved in the stipulation heretofore signed and filed in the above entitled cause, on the 28th day of September, 1892, to extend the time for making or taking exceptions to the charge of the Court or in any other act ruling or decision of the Court, at the trial of said cause, is hereby revoked and withdrawn, as is also the waiver of the terms of Rule 23 of this Court, touching the time when exceptions shall be made, and that we shall object to the saving of any and all exceptions, and their incorporation in the Bill of Exceptions that were not actually made at the trial, and before verdict.

RELFE & BRINKER and
PALMER & CARROLL,
Attorneys for Plaintiff.

And afterwards, to-wit: on the 28th day of December, 1892, there was duly filed in said Court, in said cause, A Motion to Vacate and Set Aside the Order made October 3d, 1892, in the words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Washington, Western Division.

Cora E. Nixon

vs.

The Pacific Mutual Life Insurance Company of California, (a corporation,)

Comes now the above named plaintiff by her attorneys, and moved the Court to amend and vacate so much of its order made and entered in said cause on the 3d day of October, 1892, as authorizes an extension of time for excepting to the charge of the Court to the jury, or any other exceptions which were not actually made at the trial and before verdict as shown by the record, the minutes of the Judge, the stenographer's notes, and papers then filed, for the reasons following:

First—That so much of the stipulation on which said order was made as gave consent to taking exceptions after verdict, and waived that portion of Rule 23 of this Court, was a mistake and was not so understood by the counsel for plaintiff who signed the stipulation, nor by defendant's attorneys.

Second—That said stipulation was signed by one of the attorneys for plaintiff hastily and without consulting with his associate counsel, and with their knowledge or consent, and that no more was intended by him than to extend the time for presenting, settling, and signing the bill of exceptions covering exceptions already made at

the trial and before verdict, as provided by the last sentence of Rule 23.

Third--That said stipulation was made and signed the next day after verdict, and therefore amounts merely to a consent, which stipulation and consent, so far as it authorized the making and taking or saving any exceptions after verdict has been withdrawn and revoked of which defendant's counsel have been duly notified.

RELFE & BRINKER,
PALMER & CARROLL,
Att'ys for Plaintiff.

Service and copy of above motion this day (December 28, 1892) admitted.

DOOLITTLE & FOGG,
Att'ys for Deft.

And, afterwards, to wit: on Wednesday the 28th day of December, 1892, the same being the 32d judicial day of the regular July Term of said Court; present, the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,
vs.
THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA
(a corporation),
Defendant.

Judgment.

Now, on this 28th day of December, 1892, come the parties to the above-entitled cause by their respective attorneys, and the motion of the plaintiff to have judgment rendered in her favor and against said defendant in conformity to the verdict of the jury heretofore rendered in this cause on the 28th day of September, 1892, as appears by the record herein, is submiited to the Court; and defendant's motion for a new trial herein having been this day denied, and it appearing to the satisfaction of the Court that the verdict as rendered by the jury as aforesaid was for the sum of $10,997.40, the same being for the amount of the policy sued on, to wit: *interest* $10,000.00 and interest, at the rate of seven per centum per annum to the said 28th day of September 1892; and it further appearing that three months have elapsed since the rendition of said verdict, and that the plaintiff is entitled to have interest at the rate aforesaid for said period, amounting to the sum of $175.00 added to the amount of said verdict and incorporated in the judgment, making an aggregate sum of $11,172.40.

It is therefore considered and adjudged by the Court

That the said plaintiff, Cora E. Nixon, do now have and recover of and from the said defendant, The Pacific Mutual Life Insurance Company of California, the said sum of eleven thousand one hundred and seventy-two dollars and forty-cents, together with her costs and disbursements by her in this action expended, to be taxed by the Clerk, and that execution issue to enforce this

judgment, to all which defendant except and exceptions allowed.

C. H. HANFORD,
Judge.

December 28th, 1892.

And, afterwards, to-wit, on the 30th day of December, 1892, there was duly filed in said Court in said cause, The Bond of the Defendant on Appeal, in the words and figures, as follows, to-wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

CORA E. NIXON,
Plaintiff,

vs.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Defendant.

Bond.

Know all men by these presents, that The Pacific Mutual Life Insurance Company of California, by one of its attorneys, Charles S. Fogg, and T. B. Wallace and P. C. Kauffman of Pierce County, State of Washington, are held and firmly bound unto Cora E Nixon, of Pierce County, State of Washington, in the sum of twenty-three thousand dollars, to be paid to the said Cora E. Nixon, her heirs, executors, or administrators for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated, this 29th day of December A. D. 1892.

Whereas, the above-named, the Pacific Mutual Life Insurance Company of California, by one of its attorneys, Charles S. Fogg, hath sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled action by the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division, and desires a stay of proceedings on said judgment.

Now, therefore, the condition of this obligation is such that if the above bounden, The Pacific Mutual Life Insurance Company of California, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,

(Seal) BY CHARLES S. FOGG,
One of its Attorneys.

(Seal) T. B. WALLACE,

(Seal) P. C. KAUFFMAN.

STATE OF WASHINGTON, }
County of Pierce. } ss.

T. B. Wallace and P. C. Kauffman being first duly sworn, each for himself says, that he is over the age of twenty-one years, a citizen of the United States of America and a freeholder of Pierce County, Washing-

ton. That he is not an attorney-at-law nor an officer of this Court; that he is worth the amount specified in the foregoing bond, over and above all just debts and liabilities and exclusive of property exempt from execution.

T. B. WALLACE,
P. C. KAUFFMAN.

Subscribed and sworn to before me this 29th day of December, A. D. 1892.

(Seal) F. S. DENMAN,

Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

Approved by me this 30th day of December, 1892.

C. H. HANFORD,
U. S. District Judge, Presiding in said Circuit Court.

UNITED STATES OF AMERICA, ss.

The President of the United States of America,

To the Judges of the Circuit Court of the United States, for the District of Washington, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Cora E. Nixon, Plaintiff, and The Pacific Mutual Life Insurance Company of California, Defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, within thirty days from the date of this writ to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness,

(Seal.) The Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States, the one hundred and seventeenth.

The above Writ of Error is hereby allowed.

C. H. HANFORD,
District Judge presiding in said Circuit Court.

A. Reeves Ayres,
Clerk U. S. Circuit Court, Dist. Wash'n.

United States Marshal's Office,
District of Washington. } ss.

I, Thos. R. Brown, U. S. Marshal for the District of Washington, do hereby certify that I served the within Writ of Error on the within named Cora E. Nixon, at the County of Pierce, in the State of Washington, on the third day of January, A. D. 1893, by then and there delivering to

the said Cora E. Nixon, personally, a true and correct copy of the within Writ of Error, and that at the same time and place, I served the within Writ of Error on Leroy A. Palmer, one of the attorneys for the within named Cora E. Nixon, by then and there delivering to the said Leroy A. Palmer, personally, a true and correct copy of said Writ of Error.

THOS. R. BROWN,
U. S. Marshal.
By D. G. Lovell, Deputy.

Marshal's Fee, $8.24.

UNITED STATES OF AMERICA, ss.

To Cora E. Nixon, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the District of Washington, Western Division, wherein The Pacific Mutual Life Insurance Company of California is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness,

(Seal.) The Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 28th day of December, A. D. 1892, and of the Inde-

pendence of the United States, the one hundred and seventeenth.

C. H. HANFORD,
U. S. District Judge, presiding in said Circuit Court.

Attest: A. Reeves Ayres,
Clerk U. S. Circuit Court, Dist. Wash'n.

United States Marshal's Office, }
District of Washington. } ss.

I, Thos. R. Brown, U. S. Marshal for the District of Washington, do hereby certify that I served the within citation on the within named Cora E. Nixon at the County of Pierce, in the State of Washington, on the third day of January, A. D. 1893, by then and there delivering to the said Cora E. Nixon, personally a true and correct copy of the within citation and that at the same time and place I served the within citation on Leroy A. Palmer, one of the attorneys for the within named Cora E. Nixon by then and there delivering to the said Leroy A. Palmer personally a true and correct copy of said citation.

Thos. R. Brown,
U. S. Marshal,
By D. G. Lovell, Deputy.

Marshal's Fee $8.24.

United States of America, }
District of Washington. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States of America for the District of Washington, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from one hundred to one hundred and sixty-

five, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The Pacific Mutual Life Insurance Company of California, Plaintiff in Error, against Cora E. Nixon, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the City of Tacoma, in the District of Washington, this 24th day of January, in the year of our Lord, one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

(Seal) A. REEVES AYERS,
Clerk.

No. 99.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Brief on Behalf of Plaintiff in Error.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, (a Corporation),
Plaintiff in Error.

vs.

CORA E. NIXON,
Defendant in Error.

Error to the Circuit Court of the United States, for the District of Washington, Western Division.

J. R. BRODIE & CO., PRINTERS, 401-403 SANSOME ST., S. F.

Chas. N. Terry
Atty for plff in error

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a Corporation),
Plaintiff in Error,
vs.
CORA E. NIXON,
Defendant in Error.

Statement of Case.

Defendant in Error, as plaintiff, filed her complaint in the Court below against the Plaintiff in Error, as defendant, for the recovery of the sum of ten thousand dollars, claimed to be due upon a policy of life insurance issued by the defendant below, Plaintiff in Error here, upon the life of her husband, now deceased.

The original pleadings were all superseded by an amended complaint filed September 15, 1892, found in the record commencing at bottom of page 20; the answer to the Amended Complaint, commencing at page 24 of the record; and the reply thereto, commencing at page 32 of the record.

No question of jurisdiction is raised. It appears without dispute, both from the pleadings and the evidence, that a contract of life insurance was entered into September 1st, 1889, between the plaintiff in error and Thomas Lea Nixon, the husband of this defendant in error, whereby plaintiff, for the considerations mentioned in said contract, insured the life of said Thomas Lea,

Nixon, and upon the conditions named in the contract agreed to pay to said Thomas Lea Nixon, or his assigns, on the first day of September, 1909, the sum of $10,000; or, if he should die in the mean time, then to pay said amount to Cora E. Nixon, this defendant in error, plaintiff below. See *Policy*, p. 69; and *Application*, p. 76.

The contract of insurance was in two parts, the first being the application made by said Thomas Lea Nixon, dated August 15th, 1889, a copy of which is entered in the record between pages 76 and 77, in which it is declared and agreed by and on the part of said Thomas Lea Nixon among other things as follows:

"That only the officers at the home office have author-
" ity to determine whether or not a policy shall issue on
" any application, and that they act only on the state-
" ments and representations in the applications, and that no
" statements, representations or information made or given
" by or to the person soliciting or taking the application for
" a policy, or to any other person, shall be binding on the
" company, or in any manner affect its rights, unless
" such statements, representations or information be re-
" duced to writing and presented to the officers of the
" company at the home office in this application."

"It is hereby declared and warranted that all the state-
" ments and answers made in this application, including
" the answers to questions to be asked by agent, and the
" questions to be asked by the medical examiner are com-
" plete and true, and that they, together with this decla-
" ration and agreement, constitute an application to the
" Pacific Mutual Life Insurance Company of California
" for a policy of insurance, and are offered as a considera-

" tion for the policy hereby applied for. And it is agreed " that there shall be no contract of insurance until a " policy shall have been issued and delivered by the said " company, and the first premium thereon paid while the " person proposed for insurance is living and in the same " condition of health described in this application; and " that if said policy be issued the declarations, agree- " ments and warranties herein contained shall constitute " a part of the contract, and the contract of insurance " when made shall be held and construed at all times " and places to have been made in the City of San Fran- " cisco, in the State of California."

" It is agreed that the policy issued upon this applica- " tion shall become null and void if the premium thereon " is not paid as provided therein, and should such policy " become null and void by reason of the non-payment of " premium all payments previously made shall be for- " feited to the company, except as therein otherwise pro- " vided."

And was so pleaded in the Answer (pages 26 and 27), and which averments were not denied in the reply, but were and are proved by and upon the face of the application aforesaid.

The second part of the contract consisted of the policy, found at pages 69 to 73 of the record, dated September 1st, 1889, which declares on its face that it was made by the Pacific Mutual Life Insurance Company of California " in consideration of the representations made to them " in the application therefor, and of the agreements " therein contained, which application is made a part of " this contract, and of the sum of five hundred and

"seventeen dollars and eighty cents, and of the annual "payment of a like amount, to be paid on or before "twelve o'clock noon of the first day of September in "every year during the continuance of this policy." And on the face of said policy it was further provided "that "after the payment of the first premium thereon a grace "of thirty days for the payment of premium shall be al- "lowed, but only in case the same is paid during the "lifetime of the insured aforesaid;" and also "that no "alteration or waiver of the conditions of this policy "shall be valid unless made in writing at the office of "said company in San Francisco, and signed by the "President or Vice-President and Secretary or Assistant "Secretary." All of which was duly pleaded in the Answer (pages 28 and 29) and admitted (by not being denied in the Reply), and all of which appears upon the face of the policy so appearing in the record as aforesaid.

Plaintiff below alleged faithful performance of all the conditions of the contract on the part of the insured (p. 23). This was denied by the defendant (p. 29, paragraph 10), and in paragraph 11 (same page) the defendant specially averred that the premium falling due September 1st, 1890, was never paid, nor any part thereof, and that the same was not tendered within the thirty days grace, by reason whereof the policy became null and void according to the terms of the contract.

This averment of non-payment or tender was denied in the Reply; also denied that policy became void (p. 33, paragraphs 2 and 3). Plaintiff then for further reply alleged as follows (see pp. 33 and 34):

"That the said defendant company by its duly author-
" ized agents at the expiration of the thirty days grace
" following the first day of September, 1890, duly and
" fully waived the payment of the second annual pre-
" mium as to the time when such payment should be
" made by the terms of the said policy, and all other con-
" ditions therein, and extended the time of the payment
" thereof, as hereinafter stated, and specially authorized
" and requested the said Thomas L. Nixon to pay said
" second premium during the month of October, 1890,
" and did on or about said date notify and declare to said
" Nixon that if said premium should be paid at any time
" during said month of October the same would be ac-
" cepted by said company as if paid in accordance with
" the terms of said policy."

" That, in reliance upon and in pursuance of said re-
" quest, extention and notification, the said Nixon, through
" this plaintiff thereupon immediately undertook to pay
" said second premium.

" That defendant had no office or place of bnsiness in
" Pierce County, in which the insured then lived, and
" the local agent of defendant was then absent from said
" county and so remained absent till after said month of
" October.

" That, after repeated efforts, being unable to find said
" agent or other person to whom said premium might be
" paid, up to the 31st day of October, 1890, the same,
" to-wit: the sum of $517.80, was on said date forwarded
" and paid to said company through one Edward C. Frost,
" the general agent residing at Portland, Oregon, who was
" duly authorized to receive the same as such, and the

" same duly applied to the payment of said premium, and " that said defendant has ever since then kept and retained " said sum of $517.80, and does so now.

" Wherefore plaintiff says that defendant has waived " all conditions in said policy with reference to the pay- " ment of said premium in any wise and all right or claim " or forfeiture, if any it ever had, and is, and ought to be " estopped from claiming any forfeiture under said policy."

(The subsequent "further reply" was afterwards stricken out by the Court—pages 103-4—and no point attempted to be made under it.)

Upon the trial no claim was made, or evidence offered showing that an attempt was made to pay or tender the premium falling due September first, 1890, until after the expiration of the thirty days of grace provided in the policy, so that the sole issue presented to the Court and jury below was, whether or not there had been a waiver of time on the part of the defendant below (plaintiff here) and a payment of the premium, and acceptance of the the same *by the company*, after its maturity, and the days of grace provided for in the contract.

The jury found upon that issue in favor of the plaintiff below (defendant here). Motion in arrest of judgment and for new trial was made upon the grounds, among others, of insufficiency of the evidence to justify the verdict; that the verdict was not supported by the evidence; that it was contrary to the evidence and contrary to law (pp. 49-50). Which motion was by the Court denied, and the ruling of the Court upon that motion is assigned as error and relied upon here. The evidence bearing upon that issue will be cited in our brief of argument upon that point.

Assignment of Errors.

I.

The Court erred in admitting in evidence the policy of insurance in this case, for the reason that the contract of insurance herein sued on was in two parts, neither of which disclosed the entire contract, but both parts are necessary, and required to show the entire contract. (See pages 59 to 61 and Exhibit at p. 69.)

II.

The Court erred in not sustaining defendant's motion for a non-suit made at the close of the plaintiff's evidence, for the reason that there was no evidence then in the record upon which the jury could find a verdict for plaintiff. (See pages 64 and 101-102).

III.

The Court erred in sustaining objections to the questions propounded to the witness for the defendant, William M. Fleming; as to a conversation between him and Thomas Lea Nixon. (See p. 64).

IV.

The Court erred in refusing to permit the defendant to prove by said witness that "within thirty days after the " premium fell due, within the days of grace allowed, " the witness, then an agent of the company, called on " Mr. Nixon and had a conference with him in his office, " in which Mr. Nixon stated that he did not intend to pay " the premium, but proposed to let the policy lapse." (See p. 65).

V.

The Court erred in refusing to give to the jury the following instructions as prayed by defendant:

" The application for insurance was written and signed " in this State, and was made by said Thomas Lea Nixon, " dated August 15, 1889, and provided that the policy, if " one should be issued thereon, should bear date on and " run from the 1st day of September, 1889. This appli- " cation was addressed to the defendant, The Pacific " Mutual Life Insurance Company of California, a cor- " poration organized and existing under the Laws of the " State of California, and having its principal place of " business in San Francisco, in that State, and the appli- " cation provided upon its face that if the propositions " for life insurance therein contained should be accepted " and a policy issued thereon, the contract of insurance " should be held and construed at all times and places to " have been made in the City of San Francisco, in the " State of California. The application was accepted and " the policy issued and made in San Francisco, in the " State of California, and bore date September 1st, 1889, " and by the terms of the contract itself became and was " a California contract, and the rights of the parties " thereunder were governed by the terms of the contract " and the laws of the State of California."

VI.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

" It is further provided in this application for insurance, " and became a part of the contract, that all the declara- " tions, agreements and warranties therein contained shall

" constitute a part of the contract, and that the applica-
" tion with its declarations, agreements and warranties
" was offered as a consideration for the policy applied for,
" the policy itself expressing on its face that it was made
" in consideration of the representations made in the ap-
" plication therefor, and the agreements therein contained,
" which application is made a part of the contract; and of
" said sum of five hundred seventeen and 80-100 dollars
" and the annual payment of a like amount to be paid on
" or before 12 o'clock noon, on the 1st day of September
" in every year during the continuance of the policy."

VII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"It is admitted that the contract of insurance was duly
" made and executed, containing all of the provisions
" hereinbefore stated; that the first premium thereon was
" paid and the policy delivered, and the only issue in this
" case is as to whether or not the second premium, which
" fell due on the first day of September, 1890, was paid
" according to the terms of the policy or contract."

VIII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"If you should find from the evidence that it was so
" paid, and that the insured, Thomas Lea Nixon, com-
" plied with the terms and conditions of the policy on
" that behalf on his part, then you will find for the plain-
" tiff; but on the other hand, if you find from the evidence
" that the premium which fell due on the 1st day of

" September, 1890, was not paid on or before 12 o'clock " of that day, or within the thirty days grace, to wit: the " next succeeding thirty days thereafter, according to the " terms of the policy and within the lifetime of the in- " sured, then it is your duty to find for the defendant."

IX.

The Court erred in refusing to give to the jury the following instructions as prayed by the defendant:

"I charge you that under the law of the contract, to " wit: the Statute and the Laws of California, the pro- " vision made in this contract for prompt payment of the " premium when due was a warranty that the premium " should be so paid, and that a failure of this provision " rendered the contract void under the Statutes of Cali- " fornia, as well as under the provisions of its own terms " found on its face. This provision was one which the " parties had a right to make, and having made it, it be- " came of the essence of the contract, and was binding " upon the contracting parties and upon the beneficiary " under the policy. The time within which the payment " was to be made was also of the essence of the contract " and sickness or disability would not constitute an excuse " for non-payment which operated to defeat the lapse of " the policy, or prevent it becoming void for non-payment."

X.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant.

"If there was a failure to pay this premium within the " time fixed by the contract it defeats the plaintiff's right " to recover in this action; the policy lapsed and became

" void by reason of that non-payment, and no promise of " an agent to accept the premium after the time when it " should have been so paid, would operate to renew the " policy, even the act of a person holding an agency of " this plaintiff in receiving, receipting for and temporarily " retaining the amount of the premium, past due and for " the non-payment of which the policy had lapsed by its " own terms, would not operate as a waiver so as to re- " new the policy or entitle the plaintiff to recover there " on."

XI.

The Court erred in instructing the jury as it did in that part of its instructions which reads as follows (p. 132; Exception p. 54):

" But an actual payment of the money so that the full " amount was received by the company when paid by the " plaintiff in this case is a payment of that premium; and " if received and retained by the company would be ex " actly equivalent to payment within the period provided " in the contract when it should have been paid. In " other words, a payment is as much a payment made " after the date when it is due and payable, provided it " was received and retained by the company, as if it had " been made before that time."

XII.

The Court erred in instructing the jury as it did in that part of its instructions which reads as follows (pp. 132–133; Exception pp. 54 and 55):

" Now, Mr. Frost appears by the pleadings and the " evidence to have been acting for this company, and

" whatever he did within the scope of his authority to " represent the company will be regarded as the act of the " company. Acts of his unauthorized and outside of the " scope of his authority as an agent of the company, are " not binding upon the company, unless he assumed to " act for the company and the company knew of his action " and received and retained the benefit of his action, and " failed promptly to give notice to the plaintiff that his act " was not indorsed or approved by the company. If he re- " ceived money from the plaintiff for the company which " he was not authorized at the time to receive, and yet " retained it and applied it to the use of the company, " with the knowledge of his superior officers in the com- " pany, and if they failed to notify the plaintiff that the " payment was not approved or received by the company, " and failed to return the money, if they received it, then " it would be by reason of the failure of the company to " repudiate his act promptly, equivalent to an authorized " act and be regarded as the ratification of the action of " the agent of the company in a matter in which he was " previously unauthorized."

XIII.

The Court erred in instructing the jury as it did in the last sentence of that part of its instructions which reads as follows (p. 133; Exception pp. 55–56):

" If the plaintiff sent the amount of the second pre- " mium on this policy to Mr. Frost at Portland, to be " applied as a payment of the second premium on this life " insurance policy, Mr. Frost would have no right to " receive and retain the money for any other purpose than " as a payment on the policy as the second premium,

" according to the instructions sent with the money. If, " however, being authorized, he simply retained the money " temporarily and promptly notified the plaintiff that it " had not been applied in payment of the premium, the " company would not be bound by his act in receiving " the money. If, however, he retained the money, after " being requested, or notified by the plaintiff to return it, " then his assumption in the matter of acting as trustee " or agent of the plaintiff, would be unwarranted, and, as " far as he was acting with the knowledge of the manag- " ing officers of the company, would be binding upon " them in the same manner as where he acted for the " company in any other respect."

XIV.

The Court erred in instructing as it did in that part of its instructions reading as follows (pp. 133–134; Exception pp. 56–57):

" Under the particular condition of this case, it is one " in which promptness and actual good faith was required " on both sides. It was required of Mr. Frost, if he did " not intend to apply the money he received in payment " of this premium to make the policy good, that he " could give prompt notice. If he did give prompt notice, " it was incumbent upon Mr. Nixon or Mrs. Nixon, to " act definitely in the matter of furnishing the additional " certificates that were required, or notify him that they " could not or would not furnish them, and call for their " money to be returned, and if they did not notify Mr. " Frost, and ask for the return of the money, and it was " yet retained by Mr. Frost, with the knowledge of his

" superior officers in the company, then it cannot be in-
" sisted that he was acting as Trustee or Agent of the
" plaintiff in holding the money, but it will be regarded
" as money received and retained by the company, and
" bind them to make an application of it as a payment
" in accordance with the original intention and instruction
" of the plaintiff in sending it."

XV.

The Court erred in instructing the jury as it did in that part of its instructions which reads as follows: (p. 134; Exception p. 57):

" Now, it is for you to take into account the testimony,
" the letters and correspondence that has been introduced,
" and decide what effect to give to this evidence, to de-
" termine whether the company received this money or
" not, and whether it has retained it after it should have
" returned it, in case the company declined to receive it
" as payment; and as you decide that question, you will
" make up your verdict for or against the plaintiff."

XVI.

The Court erred in overruling defendant's motion for a new trial herein.

XVII.

The Court erred in rendering judgment herein, in favor of the plaintiff and against the defendant.

Brief of Argument.

I.

Under our first assignment of error we submit, that the paper offered by plaintiff below to make out her case,

(the Policy, p. 69 of the record), showed upon its face that it was only a part of the contract. It was offered for the purpose of proving not only the fact that there was a contract, but also the terms and conditions of that contract. It is a rule of law of such universal application, that when a party offers in evidence an instrument necessary to be considered in determining the rights of the parties litigant, he shall offer the whole instument, that the citation of authorities in support of such a proposition would seem to be not only unnecessary but presumptuous. In this case there was no excuse for the refusal to offer the whole, for while the part not offered was in the posession of the other party, it was present in Court and tendered to plaintiff's counsel so that it might be offered in connection with the policy, and counsel and the Court notified that if the whole was offered, no objection would be interposed. (See record, pages 60 and 82.) And it is no sufficient answer to say that the other part could be offered by the defendant if desired, or that the error was waived by a subsequent offer of the other part of the contract. Defendant was entitled to have the whole contract before the Court at the conclusion of plaintiff's evidence, so that the Court could determine whether it ought to be put upon its defence; and defendant had no opportunity of putting in this or any other evidence until the case in chief had been closed on the part of plaintiff. The ruling of the Court here assigned as error was one which required the defendant to put in the evidence upon which plaintiff relied to make out her case, and was clearly erroneous and subversive of the rights of defendant.

II.

The Court erred in not sustaining defendant's motion for a non-suit, at the close of plaintiff's case.

When this motion was made, (pp. 64 and 101, 102) the plaintiff had closed her case, and the evidence which had been offered and admitted in support thereof was:

First--The Policy, constituting one part only of the contract, (p. 69 *et seq.*) upon the face of which it appeared that the considerations thereof were the warranties contained in the application (which had not been offered) and the payment on or before 12 o'clock noon of the first day of September in each year, of an annual premium of $587.80 (p. 69); that it was issued and accepted upon certain conditions and agreements thereinafter named, (p. 70), one of which was that after the payment of the first premium a grace of thirty days for the payment of premium should be allowed, but only in case the same is paid during the life time of the insured, (p. 71); another of which was that no alterration or waiver of the conditions of the policy should be valid, unless made in writing at the office of the Company in San Francisco, and signed by the President or Vice-President and Secretary or Assistant Secretary, (p. 72).

Second—That the second annual premium was sent at the request of Mrs. Nixon by the Merchants' Bank of Tacoma to Ladd & Tilton's Bank at Portland to be paid to Mr. Frost, the general agent of the company at that place (testimony of Mrs. Nixon, pp. 84 and 85); that this was done on the 31st of October, 1890 (*Id.*, p. 86), *which was 61 days after the premium fell due;* that during October (all of which was after the expiration of the days of

grace), she had made an effort to find Mr. Fleming, the local agent, but without success (*Id.*, p. 86); that the payment was not ordered by her until October 31st, 1890 (*Id.*, p. 89); that the Merchants' National Bank of Tacoma on said 31st of October, in compliance with the request of Mrs. Nixon, telegraphed Ladd & Tilton's Bank at Portland to pay the $517.80 "to Edward C. Frost, Agent, "account of Thomas L. Nixon policy, Friday, 12 o'clock "noon" (see testimony of Davis, cashier, pp. 97 and 98); that the same was paid to Frost, who gave his receipt therefor in the words and figures following (see foot of page 74):

"Portland, Oregon, October 31, 1890.

"Received from Ladd & Tilton, Bankers, five hundred "and seventeen 80.100 dollars for account of Thomas L. "Nixon policy, per telegraphic instructions from Mer- "chants' Natl. Dated Bk. Tacoma, 10, 31, '90.

"$517.80. Edward C. Frost, Agent."

(The printed copy gives the date as Oct. 3, but that is a patent typographical or clerical error in the record as appears from the figures below and from the endorsement made at the time by Ladd & Tilton and shown at the head of the next page, as well as by all the testimony in the cause.)

And this is followed by the positive and undisputed testimony of Frost himself, found on the lower half of page 95, that he was not authorized to receive premiums more than thirty days after due.

It will be observed that his receipt is not a premium receipt in form, nor as for premium, but simply "for account," showing upon its face that the act of application was not complete.

This constitutes the entire evidence on the subject of payment in support of plaintiff's case, when she rested. Exhibit C, found at the head of page 74, had not then been admitted, but was ruled out (p. 96). At a later stage of the case during the course of the defense it was admitted without exception. (See p. 115.)

Upon this evidence we submit that it was the duty of the Court, under the law, to have granted the motion for non-suit. True, the case was not as strong at that stage in favor of defendant, as it would have been, if both parts of the contract had been in, and that fact adds force to our position under our first point. But there was enough here to show that the policy had become absolutely void under the terms and conditions of the contract, and that there had been no waiver of those terms and conditions. The very life of the obligation depended upon paying the premium September 1st, 1890, or within thirty days thereafter. No attempt was made to pay it until more than sixty days thereafter. Then the money was paid, not to the company or to any officer who had authority to waive the condition of time, but to a person who was, it is true, an agent of the company who himself swears that he had no authority to receive payment of the overdue premium, and who would not and did not give a premium receipt therefor.

It was a California contract, made and executed in the City of San Francisco. It was not only made upon consideration of the prompt payment of premium, as expressed upon its face, but the granting of a fixed number of days of grace, excluded the right to claim any greater number.

The contract being in writing it was the duty of the Court to construe it, and not to leave it to the construction of the jury.

C. C. P. of Cal. Sec. 2102.

And the Court had no right to insert anything which had been omitted, or omit anything which had been inserted.

C. C. P. of Cal. Sec. 1858.

As was said by the Supreme Court of the United States in New York Life Insurance Co. vs. Statham, (93 U.S. 24-31)**"time is material, and of the essence of the contract. Non-payment at the day involves absolute " forfeiture, if such be the terms of the contract."

Or as was again said by the same Court, reviewing, approving and making other quotations from the case last cited, in Klein vs. Insurance Co. (104 U. S. pages 90, 91 and 92):

" A life insurance policy usually stipulates, first, for the " payment of premiums; second, for their payment on a " day certain; and third, for the forfeiture of the policy " in default of punctual payment. Such are the pro- " visions of the policy which is the basis of this suit.

" Each of these provisions stands on precisely the same " footing. If the payment of the premiums, and their " payment on the day they fall due, are of the essence of " the contract, so is the stipulation for the release of the " company from liability in default of punctual payment. " No compensation can be made a life insurance company " for the general want of punctuality on the part of its " patrons.

" It was said in New York Life Insurance Co. vs.

" Statham (supra), that promptness of payment is essen-
" tial in the business of life insurance. All the calcula-
" tions of the insurance company are based on the hypoth-
" esis of prompt payments. They not only calculate on
" the receipt of premiums when due, but upon compound-
" ing interest upon them. It is on this basis that they
" are enabled to offer insurance at the favorable rates
" they do. Forfeiture for non-payment is a necessary
" means of protecting themselves from embarrassment.
" Delinquency cannot be tolerated or redeemed except at
" the option of the company."

" If the assured can neglect payment at maturity and
" yet suffer no loss or forfeiture, premiums will not be
" punctually paid. The companies must have some effi-
" cient means of enforcing punctuality. Hence their
" contracts usually provide for the forfeiture of the policy
" upon default of prompt payment of the premiums. If
" they are not allowed to enforce this forfeiture they are
" deprived of the means which they have reserved by
" their contract of compelling the parties insured to meet
" their engagements. The provision, therefore, for the
" relief of the company from liability on a failure of the
" insured to pay the premiums when due is of the very
" essence and substance of the contract of life insurance.
" To hold the company to its promise to pay the insur-
" ance notwithstanding the default of the assured in mak-
" ing punctual payment of the premiums is to destroy
" the very substance of the contract. This a Court of
" Equity cannot do. Wheeler vs. Connecticut Mutual
" Life Insurance Co., 82 N. Y., 543. See also the opin-

" ion of Judge Gholson in Robert vs. New England Life " Insurance Co., 1 Disney (Ohio), 355.

" It might as well undertake to release the assured " from the payment of premiums altogether as to relieve " him from forfeiture of his policy in default of punctual " payment. The company is as much entitled to the " benefit of one stipulation as the other, because both are " necessary to enable it to keep its own obligations.

" In a contract of life insurance the insurer and as- " sured both take risks. The insurance company is bound " to pay the entire money, even though the party whose " life is insured dies the day after the execution of the " policy and after the payment of but a single premium.

" The assured assumes the risk of paying premiums " during the life on which the insurance is taken, even " though their aggregate amount should exceed the in- " surance money. He also takes the risk of the forfeit- " ure of his policy if the premiums are not paid on the " day they fall due."

In the case of Cronkhite vs. Accident Insurance Co. of North America (35 Fed. Rep., 26) in the Circuit Court for the District of Colorado a very similar state of facts appeared. At the close of plaintiff's case the defendant moved the Court to instruct the jury to find for the defendant. This would perhaps have been the better practice here had it not been for the fact that the action was upon a California contract, and controlled by California law, and that Section 851 of the Code of Civil Procedure of California seems to prescribe the procedure here adopted in the following language: "An action may be dismissed or " a judgment of non-suit entered in the following cases:

" * * 5. By the Court upon motion of defendant when upon " the trial the plaintiff fails to prove a sufficient case for " the jury." The difference in the motion is mere matter of form of procedure, the legal effect being practically the same.

The Court granted the motion made, Mr. Justice Brewer delivering the opinion, to which we call the special attention of this Court as being particularly applicable in the present case.

Authorities to the same import as those already cited and from the same and other Courts might be multiplied, but it hardly seems necessary to do so. The plaintiff's proofs showed that neither she or her husband had complied with the terms of the contract, and that as a matter of law she could not recover. There was no matter of fact in the case to go to the jury. To allow such a case to go to them, was to make them pass on a question of law, and to deprive the defendant of the right which it had to have the Judge (and not the jury) determine the law. The non suit should have been granted. To refuse it was to invite the jury to give a verdict where there was no evidence of a fact creating a legal liability.

III.

Our third and fourth assignments of error are proper to be considered together. It was shown that at and during the days of grace upon this premium, the witness Fleming was the special agent of the company, resident at Tacoma, and called upon and had a conversation with the insured in reference to this policy (p. 64). The testimony offered and excluded, if admitted, would have shown that the insured purposely and intentionally allowed this policy to

lapse (p. 65). The refusal to admit the evidence deprived the defendant of a piece of evidence material to its defense, and operated to prejudice the minds of the jury, and prevented the defendant from having a fair trial.

IV.

The Court erred in refusing to charge the jury as requested and as set forth in our foregoing assignments of error, numbered V, VI, VII, VIII, IX, X, and each of them. The charges so requested, and each of them, correctly stated the law, as shown by the authorities cited under our Point II, and as hereinafter cited; and although the Court partially covered some of the same points by some parts of its subsequent charge, such parts were incomplete, and so intermingled with other and erroneous statements of the law as to destroy the force of that which was correct, and to mislead the jury, and to deprive the defendant of a fair trial. The requests of defendant being correct, it was entitled to have them given in the language requested.

V.

Our assignments of error numbered XI, XII, XIII, XIV and XV, may also be considered together.

There was absolutely no evidence in the case which would either warrant or justify the Court in suggesting to or instructing the jury, what would be the legal consequence, if the money had been received or retained by the company, or by any of its principal officers authorized to waive the lapse of policy by reason of non-payment in time, and all that was said by the Court on that subject, in each of the charges referred to in these assignments

was misleading to the jury, and had a tendency to furnish them with an excuse for yielding to the prejudice and bias which the entire history of jurisprudence in this class of cases influence juries in favor of claims of this character against corporate defendants.

We have already called the attention of the Court to the entire evidence bearing upon this question of payment or tender of the money, up to the point where plaintiff rested. The additional testimony, disclosed at later stages of the case, consists of the following:

1. The application, which constitutes a part of the contract between the parties, found in the record between pages 76 and 77, containing all the warranties and provisions quoted in our "Statement of the Case," and the express covenant on the part of the insured that "*the "policy issued upon this application shall become null "and void if the premium thereon is not paid as therein "provided.*" This was one of the absolute conditions of the contract, and is followed by the provision in the policy, "*that no alteration or waiver of the conditions of this "policy shall be valid unless made in writing* at the *office "of said company in San Francisco, and signed by the "President or Vice-President, and Secretary or Assistant "Secretary.*"

There is no pretense that any such waiver was ever so made.

2. Plaintiff in her reply claims (p. 33) that *at* the expiration of the thirty days grace defendant waived the payment of the second premium as to time when it should be made, and specially authorized and requested the insured to pay the same during the month of October, 1890.

We suppose it was in support of this averment that she introduced Mr. Frost's letter of October 23d, (Plff's. Ex. c. p. 72.) But that letter is not written "at the office of the company in San Francisco," or by any of the officers named in the policy as alone having authority to waive any of the conditions of the contract; does not purport to be a waiver, and is not even an invitation or request to pay the premium, or a promise to receive it. The most favorable construction that can be given to it is that it is a notification that the premium has not been received, and a request to be notified of the intentions of the insured—with an inference that some action might yet be taken to protect the interests of the insured. What action could be so taken, and which the writer of the letter evidently desired to have taken, is apparent from the testimony of Mr. Frost. At page 95 he testifies that he was authorized to write letters concerning premiums overdue, *but not to receive them.* At pages 106–7 he testifies that he received the money which was paid to him October, 31st from the Paying Teller of Ladd & Tilton, and on the same day communicated with Mr. Nixon on the subject, by letter addressed to him immediately after the receipt of the money, which letter was mailed through the regular channel, post-paid, which letter was dated October 31st, 1890, and reads as follows: (pp. 108-9.)

"Thomas L. Nixon, Esq., Tacoma, Washington:

"Dear Sir:—I have this day received, through Messrs. "Ladd & Tilton, the sum of $517.80, which I hold in "trust for you. Kindly have the enclosed blank properly "filled out by yourself and Dr. McCoy or Dr. Allen, and "return to this office, on which they will be submitted to

" the company, and if approved I will receive the amount
" as payment of second annual premium due September
" 1st and now lapsed for non-payment, and send you
" Company's receipt for the same."

"Yours very truly, Edward C. Frost."

The blanks enclosed, the witness testifies (p. 109) were: One to be signed by Mr. Nixon, declaring himself to be in good health and that he desired to be reinstated; and one to be filled out by the medical examiner, stating that he was then in perfect health, or in as good health as at the time of the application. He further testifies (same page) that these blanks were never filled out and returned, or the request contained in the letter complied with. No application was ever made for restoration of the policy, or proof of good health (p. 110.)

This testimony shows clearly the inducement for, and the intent of the letter of October 23; and as clearly that there was no promise to receive it, nor when paid, any acceptance of it as payment of the premium.

Even if there had been such a promise or such an acceptance of it by Mr. Frost, it would not have been binding upon the company.

Lantz vs. *Vermont Life Ins. Co.*, 21 Atl. Rep. 80;
Benecke vs. *Conn. Mut. Life Ins. Co.*, 105 U. S. 355.

But instead of that, there was no promise, and when the money was sent by telegraph, immediate notice was given that it was not accepted as payment. *The money was never paid to the company,* but remained in the hands of Ladd & Tilton, and was subsequently placed to the credit of Mrs. Nixon at her call (p. 110).

The letter of October 31st above quoted was addressed to Mr. Nixon, with whom alone all dealing had been had up to that time, and from whom Mr. Frost supposed the money to have come. To it no reply was made until December 22d, when Defendant's Exhibit No. 1 (p. 75) was written by Mrs. Nixon, and on the following day received by Mr. Frost (p. 111). This was responded to by Mr. Frost, who was then for the first time brought into correspondence with Mrs. Nixon on the subject, on December 26, 1890 (pp. 111-112). This letter explained to Mrs. Nixon very fully the situation and what was necessary to be done, and wound up by saying that if, in view of the situation, she desired to have the deposit returned, it would be done at once. (See Deft's Exhibit No. 2, pp. 78-79.) No response was made to that letter, but the money still remained in the bank (p. 112). On April 30th, 1891, Mr. Frost, having learned of Mr. Nixon's death, deposited the money with Ladd & Tilton, directly to the credit of Mrs. Nixon (p. 112), and immediately advised Mrs. Nixon of the fact (p. 115, and Defendant's Exhibit No. 4, pp. 77-78). On the following day he took out from the bank a certificate of deposit for the amount, payable to the order of Mrs. T. L. Nixon, a copy of which is given in the record on page 114, and enclosed the same in a registered letter to Mrs. Nixon (p. 113, and Defendant's Exhibit No. 3, p. 77), which was returned unopened, and marked refused by Mrs. Nixon, which was produced by the witness himself on the stand (p. 113), and the money still remains in the bank on deposit as the witness placed it (p. 115). During the interim between the time the money was received by Mr. Frost, and sub-

sequently deposited to the credit of Mrs. Nixon, it stood in the bank to the credit of Mr. Frost (p. 117–118). The witness was in the habit of making monthly reports, and remitting the balance due, to the company (p. 122). But this money was never accounted for to the company, or remitted to it (pp. 123–124).

This constitutes the whole evidence on the subject, and we repeat that there was nothing in the whole case to justify the Court in giving any instructions as to what was the legal effect of the receipt and retention of the money by the company, and that such instruction was misleading, and tended to prevent the defendant from having a fair trial. The receipt and retention of the money by the agent under the circumstances disclosed by this testimony was not equivalent to the receipt and retention thereof by the company, and it was error for the Court to give any instruction which would bear that construction. Even if the company had received and retained it in the same way and under the same circumstances, it would not have operated as a waiver of the lapse of the policy, it was error for the Court in its instructions to use language which could be so construed.

VI.

So also, our Assignments of Error numbered XVI and XVII may be considered together. We have already, under our Points II and V, discussed all the evidence in the case, upon which a verdict could be founded, or a judgment given, and it would but cumber the record to repeat it here. We have also, under the same points, cited authorities from the highest courts in the land, which in every case like this stand without conflict so far

as we have been able to discover, which show that under the facts of this case, and the law applied to such facts, the verdict is contrary to the evidence, and against law, and the judgment founded thereon is contrary to law. We rely upon those authorities in support of this point, as if here repeated, and add a few others bearing upon incidental points arising hereunder.

The verdict is against the law as laid down by the Court in this case, in all the parts of its instructions except those to which we have here excepted, and for which there was no warrant in the evidence.

It was competent for the parties to make a contract containing these provisions and under the facts of this case, as shown at this or any other stage of the proceedings, there was no waiver of these provisions.

Ronald vs. Mut. Res. Fund Life Assn., 30 N. E. 739;

Attorney General vs. Ins. Co. 82 N. Y. 172-190.

In *D'Orlu* vs. *Bankers' and Merchants' Mutual Life Ass'n of the United States*, (46 Fed. Rep. 355) the Honorable the Circuit Court for this District held that under the Civil Code of California, Section 2611, which provides that an insurance policy may declare that a violation of specified provisions thereof may avoid it, a tender of the premium, together with all other sums due on the policy, will not prevent a forfeiture of the policy for a previous failure to pay the premium when due, and fortifies its decision by a citation of the decisions of the Supreme Court already cited by us, and others.

The contract in this case, taken as a whole, did contain

just that provision, and the case cited is directly in point here; for the most that can be made out of the evidence in regard to payment is that it was a tender made long after the forfeiture had actually taken place, and never accepted, or brought home to the company, or to any officer having authority to waive the forfeiture.

Neither sickness or disability would excuse, or the usage of giving grace waive the forfeiture.

> Thompson vs. Knickerbocker L. I. Co., 104 U.S. 252.

The insured is presumed to have read his application and to be cognizant of the limitation therein contained as to the policy being void if premium is not paid.

> N. Y. L. I. Co. vs. Fletcher, 117 U. S., 519;
> Fletcher vs. N. Y. L. I. Co., 11 Fed. Rep. 77.

And this and all like provisions of the contract are binding upon the beneficiary.

> Cooper vs. U. S. M. B. Ass'n., 30 N. E. 833;
> Suggs vs. Traveller's Ins. Co. 9 S. W. 676;
> Reddlesberger vs. Hartford Co., 7 Wall. 386;
> Laughlin vs. Union C. L Co., 11 Fed. 280;
> Caffrey vs. Hancock N. Y. I. Co. 27 Fed. 25;
> State Ins. Co. vs. Steffels 29 Pac. Rep. 479;
> State vs. Phœnix, 47 Fed. 863.

If ever there was a case to which the language of the Supreme Court of the United States, and of the Circuit Courts of Colorado and California, from which we have quoted and to which we have referred, would apply, this would seem to be that case; and we submit that under

every rule of law applicable to the facts in this case, the judgment of the Court below should be reversed, the verdict set aside, the case be remanded with instructions to the Court below to enter judgment for the defendant below, (plaintiff in error here) dismissing the action, with costs.

CHAS. N. FOX,

Attorney for Plff. in Error.

No. 99.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Brief on Behalf of Defendant in Error.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, (a Corporation),
Plaintiff in Error,

vs.

CORA E. NIXON,
Defendant in Error.

Error to the Circuit Court of the United States, for the District of Washington, Western Division.

Dearborn, Printer, Seattle. 2024

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a Corporation),
Plaintiff in Error,
vs.
CORA E. NIXON,
Defendant in Error.
No. .....

Statement of Case.

To the statement made in the brief of plaintiff in error, the defendant in error adds the following:—

That under the pleadings in this cause, there were raised at least two distinct issues, viz:—

1.—That the defendant company, by its officers and agents, having authority so to do, extended the time for the payment of the second annual premium to October 31st, 1890, thereby waiving the forfeiture under the strict terms of the contract, and that the insured, during the said month of October, had attempted to pay said premium, but was unable to do so by reason of the fact that the local agent of the company could not be found, after repeated efforts.

2.—That so failing to find the local agent, the amount of the premium, $517.80, was paid by remittance through the bank to Edward C. Frost, the general agent of the

company at Portland, Oregon, who had full authority to receive the same; that the same was receipted for as such, and duly applied to the payment of said premium by said Frost; that the money had been thus retained by the company for a period of six months, and no effort made (as shown by the evidence) to return it or repudiate the payment till after the death of the insured; that the premium is still so retained, and that the company is and ought to be estopped from claiming a forfeiture under the strict terms of the policy, and has waived its right to insist upon a forfeiture.

There was a further reply setting up the non-forfeiture Act of 1872 of the Legislature of California, which was on motion stricken out, for the reason that if such a law was in force the Court would take judicial notice of it, and the same need not be pleaded. At the trial, the plaintiff below, having introduced the policy, and having shown by competent testimony the payment of the money to Mr. Frost, the general agent of the company, on October 31st, 1890, *to be applied as a payment of such premium*, and his receipt, so accepting it, as well as the contined retention of it, then attempted to prove the allegations, that the company had extended the time of payment through the month of October, and the unsuccessful attempts to make the payment by reason of the continued absence of the local agent, all of which, on the objection of counsel for defendant below, was excluded by the Court, so that, as stated by the eminent counsel for plaintiff in error, the issues thus limited were, whether the company had received the money, and by its acts, had waived the forfeiture, and was estopped.

The jury, under the instructions of the Court, found the issues in favor of the plaintiff below.

As is shown by the record, the defendant below did not make or tender any exceptions to the charge of the Court, or to any portion thereof, either orally or in writing, before verdict, as required by Rule 23 of the Circuit Court Rules of Practice. On the day *succeeding* the trial, one of the counsel for plaintiff below, without the knowledge or consent of his associates, signed a stipulation drawn up by opposite counsel, in which he inadvertently and unintentionally (as shown by his affidavit) agreed to waive the requirements of said rule, and extend the time, not only for the filing, but *making* exceptions. This stipulation and consent, so far as it attempted to authorize the *making* of exceptions out of time, was distinctly repudiated, and withdrawn by counsel for plaintiff below, before the day set for hearing the motion for a new trial, of which opposite counsel were duly notified. (Record, pp. 160-161.)

Hence all the exceptions to the charge of the Court, although incorporated in the bill of exceptions, against the objection and protest of counsel for defendant in error, and actually made long after the trial, should be ignored, and all of the assignments of error stated in the brief, from XI to XV, both inclusive, based thereon, should be disregarded.

The testimony of Frost, general agent (Record, p. 95, *et supra*), shows that the letter of October 23, 1890 (Record, p. 74), from his office, which was, in substance, a renewal of demand for payment, was duly authorized; and the testimony of Davis (Record, p. 97, *et seq.*) shows

that the money was remitted, received and applied to the payment of the premium, so far as Mr. Frost, as general agent, had authority, as between the company and those interested in the policy.

So that the whole case, as tried, rests upon these propositions: Was there a waiver, and was the money thus paid received by the company? Both of which, defendant in error contends, must be answered in the affirmative.

It is assumed, that in the consideration of this case, the entire testimony set forth in the record will be taken as incorporated in the bill of exceptions, as the same is called for therein, and that we shall not be confined to the partial statement set forth in the bill of exceptions. It was so understood when the bill of exceptions was settled.

Brief of Argument.

I.

The first assignment of error is groundless. The policy itself was admissible. It was fully and substantially pleaded in amended complaint, and the answer admitted, and in addition set up all the terms of the application for the policy (the same being a part of the contract) on which defendant relied as a defense, and those allegations were admitted in the reply. There was no necessity for the introduction of the "application." It had always been in the possession of defendant, and no issue was raised as to its contents or the legal effect of its obligations as a part of the contract.

Ins. Co. vs. Robertson, 59 Ills., 123.

The provision therein contained, that the policy should become void if the premium should not be paid, "as provided therein" was also inserted in the policy itself.

So that the defendant had the full benefit of all of its provisions involved in this controversy. There was nothing in the application which was relied upon as a defense that was not before the Court in the pleadings as facts alleged and admitted. The defendant's rights were neither affected nor impaired by the failure to introduce the "application."

As to the second assignment of error,—the refusal of the Court to grant a non-suit,—it is sufficient to say that this question of practice is settled by repeated decisions.

Motion for non-suit is not proper.

N. P. R. R. Co. vs. Charless, 2 C. C. A. Rept., 390 and authorities cited.

Oscanyan vs. W. R. Arms Co., 13 Otto 261.

Ins. Co. vs. Unsell, 144 U. S. 439.

The defendant, if it intended to stand upon the case made by the plaintiff's evidence, should have moved the Court for a peremptory instruction, and appealed from an adverse decision, without introducing testimony in its own behalf, but it failed to do this. Having gone into its defense by introducing testimony covering the whole case, it would be held to have waived its exception had the proper motion been made and denied.

Robertson vs. Perkins, 129 U. S., 233.

R. R. Company vs. Charless, 2 C. C. A., Rept. 391, and authorities cited.

However, if this were an open question, we think the Court below was fully justified in sending the case to the jury. To do otherwise would have been an usurpation of the province of the jury.

Leaving out of consideration all questions as to extension of time by the company, and the efforts to make payment prior to the actual date of payment, the fact clearly stands forth that the premium was paid, as such, and accepted as such, by the general agent, who had authority so to do. The money was transmitted by the following telegram addressed to Ladd & Tilton, bankers, etc., by the Merchants National Bank of Tacoma, for Mrs. Nixon:

"October 31st, 1890.

"LADD & TILTON, Bankers,

"Portland, Oregon:

"Pay to Edward C. Frost, agent, $517.80, account "Thomas L. Nixon policy, Friday, 12 o'clock noon." (Record, page 98.)

The receipt for same was as follows:

"Portland, Oregon, Oct. 31st, 1890.

"Received from Ladd & Tilton, bankers, five hundred "seventeen 80-100 dollars, for account Thomas L. Nixon "policy, per telegraphic instructions from Merchants "National Bank, Tacoma, 10-30, 1890.

"EDWARD C. FROST, Agent."

(Record, p. 74, Exhibit "B.")

This money was retained by him for the company from October 31st, 1890, till May 1st, 1891 (fifteen days after the death of the insured, being altogether a period

of over six months), at which time an attempt was made to refund it in order to escape liability. The position taken by the company was that its agent could hold this money indefinitely. If Nixon got well, it would keep it and reinstate him; if he died, it would refund it and shield itself under the provision of the policy pleaded by defendant,—"that no alteration or waiver of the conditions of this policy shall be valid unless made in writing at the office of said company in San Francisco, and signed by the president, or vice-president, and secretary, or assistant secretary."

It is clear that the defendant company had full knowledge of the receipt of this premium by Frost, its general agent, and the terms on which he received it, and of his retention of it for its benefit, as was shown by his subsequent testimony on cross-examination after he testified in behalf of defendant. The knowledge of the agent is the knowledge of the company, particularly of all facts which it was his duty to communicate to his superior officers.

> Ins. Co. vs. Bank of Pleasanton, 31 Pac., 1069.
> See McGurk vs. Ins. Co., Book I Lawyers' Reports Annotated, p. 563, and numerous decisions referred to in notes appended thereto.

It is true that this payment was made 30 days (not 61 days) outside of the literal terms of the contract, as the contract gave 30 days grace if insured was living, yet it was received and kept by a general officer of the company, with the knowledge of the company, till after the death of the insured.

The money was sent explicitly as a payment of the premium, and so acknowledged by the general agent, of which the company had notice. If it desired not to be bound by the act of its agent, it should have promptly repudiated it, and require him to refund it at once, but it acquiesed.

Qui tacet consentire videtur, ubi tractatur de ejus commodo; 9 Mod., 38.

Upon this state of facts, the plaintiff not only had a right to go to the jury, but was entitled to a verdict.

The scope of this authority as general agent could not be fixed by his declarations on the witness-stand, but will be presumed to be coextensive with that of the chief officers of the company within the limits of the territory assigned to him.

See authorities *infra*.

The question here is not the effect of non-payment of the premium on September 1st, or October 1st (the end of 30 days grace), but of its payment on October 31st, and the acceptance and retention of it by the company ever since.

Hence the authorities cited favoring a forfeiture are not in point.

A careful reading of Ins. Co. vs. Statham, 93 U. S., 24, will show that the only points decided were, first, that the existence of war which prevented the payment of premiums afforded no legal excuse for non-payment; second, that plaintiffs were entitled to recover to equitable value of the policy. In addition to this, Mr. Justice Bradley gives us a learned dissertation upon the theory

and practice of the business of life insurance, which we respectfully insist is purely *obiter*, and from which four of the judges dissented. This *dictum*, quoted in the brief of counsel, has since been repudiated.

The same may be said of Klein vs. Ins. Co., 104 U. S., 90, which merely followed the Statham case. In Wheeler vs. Conn. Mutual Life, the question was, whether insanity excused payment, and the further decision in that case is exactly opposite to that of the Statham case. With the New York Court of Appeals, the existence of war constituted a good excuse for non-payment.

In all the cases cited by counsel for plaintiff in error, there was a clear default and no payment whatever. In the case at bar, there *was* a payment and the same was made under an extension of time. The authorities cited by counsel are not in point.

Counsel says in his brief, "It was a California contract, made and executed in the City of San Francisco," and proceeds to invoke the law of California as controlling the pleading and practice in this case, tried in Washington.

It is true that the "application" contained this clause, "The contract of insurance when made shall be held and construed at all times and places to have been made in the City of San Francisco, in the State of California." Yet we respectfully dissent from the views of opposite counsel as to the effect of this. Whatever that may be, it surely could not alter the practice and procedure in the State of Washington, or give to the California Code any extra-territorial force. It was the duty of the Court

to construe the contract, as in all such cases. It did so, and there is no ground of complaint on that score.

But, as a matter of fact, the evidence shows conclusively that the policy was bargained for, delivered, and the first premium paid in Washington Territory. It was not therefore, in fact, a "California contract."

Equitable Life Ins. Co. vs. Pettus, 140 U. S., 226.

But we fail to see any necessity for this discussion. The rule invoked in the citation by counsel of the California Code is one which obtains in all our Courts independently of any such statute.

The third and fourth assignments of error were the exclusion of Fleming's testimony, tending to prove that within the 30 days grace allowed for payment of premium, Nixon stated to him, "that he did not intend to pay the premium, but proposed to let the policy lapse."

This was utterly immaterial, if true. It was only indicative of an intention which might change during the period of grace. The beneficiary, Mrs. Nixon, had a right (which she exercised) to pay this premium. Payment by a stranger, if accepted, would be good. The fact that the money was paid and accepted by the company is conclusive. Besides, the testimony was inadmissible under Sec. 1646, 2 Hill's Code, Washington, Nixon being dead, and this objection was made at the time. (Record, p. 105.)

The refusal of the Court to give the second instruction asked by defendant is the fifth assignment of error.

The only objection urged here by counsel for plaintiff in error is that the Court did not tell the jury that this

was a "California contract," and that "the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California."

If this instruction had been given, it is difficult to perceive how it would have aided or enlightened the jury.

"California contracts" may have some peculiar significance and force when made with corporations in that State, but we doubt whether that extends beyond the limits of that commonwealth.

The sixth assignment of error is fully met by the fact that the Court charged the jury that the "application" (which was read to the jury), with all it contained, was a part of the contract.

The seventh and eighth assignments of error misstate the issues in the cause. They say, "the only issue is whether the second premium was paid according to the terms of the policy or contract," that is, on September 1st, 1890, or within 30 days from that date.

This was not the issue raised by the pleadings. It would have been, under the testimony, a declaration that a payment made after maturity, accepted and retained by the company, had no effect in keeping the policy in force. Such is not the law.

As regards the ninth and tenth assignments of error, the Court, in its charge, substantially adopted all of the prayer of the eighth instruction, except that portion which declared that, under the laws of California, the provision for the payment of the premium when due "was a warranty that the premium should be so paid, and that a failure of this provision rendered the contract void under the Statutes of California, as well as under

the provisions of its own terms found on its face." The authorities cited by us constitute a sufficient reply to this. Such an instruction, as also the ninth prayed for, utterly ignores the issues raised by the pleadings on which the case was tried, and amounts to an instruction to the jury to find a verdict for defendant.

The several other assignments of error, from XI to XV, both inclusive, constitute an attack upon the charge of the Court, to which, as we maintain, no exceptions were made at the trial. And exceptions subsequently made can not be considered here.

Life Ins. Co. vs. Snyder, 93 U. S., 393.
Stanton vs. Embry, Ibid. 548.
M. S. vs. Carey, 110 U. S., 51.

The substance of the charge here complained of, is that an actual payment of the premium to the company after maturity, received and retained by it, is a good payment; that the acts of the general agent within scope of his authority were binding on the company; that his acts outside of his authority known and ratified by the company in accepting the benefit of such acts, and not repudiated by the company, bound it as if authorized; that the general agent, Frost, had no right to receive or retain the money for any other purpose than that for which it was sent, but that if he promptly notified plaintiff that the money would not be so applied, the company would not be bound; that if he retained it after demand for its return, with the knowledge of the company, the latter would be bound by his acts, unless promptly repudiated, and the money would be considered

as held by the company according to the terms of its transmission, as a payment of the premium.

It would be difficult to conceive a more logical and correct statement of the law of this case, as applicable to the testimony, than that which is set forth in the charge of the Court.

As to the XVI assignment of error:

Numerous and repeated decisions of the Supreme Court have established the rule that the action of the Court below in refusing a new trial is not subject to review in the Appellate Court.

Among the later cases on this point are:

Fishburn vs. Railway Co., 137 U. S., 60,

Construction Co. vs. Fitzgerald, Ibid. 98.

The argument of counsel for plaintiff in error states two propositions only.

1st.—That no payment of the second premium having been made or tendered prior to October 1st, 1890, the date of the expiration of the 30 days of grace, *ipso facto*, the policy became void under the terms of the contract.

2d.—That it not having been shown that a distinct waiver of the condition as to prompt payment had been made "*in writing, at the office of the company, in San Francisco, signed by the president or vice-president, and secretary, or assistant secretary,*" no such waiver was or could be made by any other agent of the company, that would be binding upon the company, although the company had knowledge of and acquiesced in the acts of such agent; that the method of waiver by the chief officers of the company in *writing* was exclusive.

As to the first proposition: It evades the real issue. The question presented upon the pleadings and testimony in the cause is, whether the agents of the company having, with the knowledge of the company, given an extension of time, a payment made out of time, but within such extension, and received and accepted by the company and retained by it till after the death of the insured constituted a waiver and a payment. We will discuss this further on.

As to the second proposition: It is admitted that no *written* waiver by the president or vice-president, secretary or assistant secretary, as above set forth, was ever made. But defendant in error insists that the acts of general agent Frost, within the broad scope of his authority, were such as to constitute a waiver, and that the payment to and receipt by him of the premium, with the knowledge of and acquiescence by the company, till after Nixon's death, is conclusive.

The situation was this: The advice of the local agent, whether right or wrong, whether authorized or not, was to the effect that the premium might be paid at any time during October. This testimony was excluded, but we refer to it for the purpose of the argument. Relying upon this, Mrs. Nixon arranged for the payment, but after fruitless search failed to find the agent. At this juncture a letter is received from general agent Frost, dated October 23d, 1890, saying: "I find, upon examination of our records, that your life premium in amount, $517.80, has not been received at this office. As this directly affects your interest, will you kindly notify me

by return of your intentions, and oblige, yours very truly, Edward C. Frost." (Record, p. 74.)

This, to an ordinary mortal, not versed in the methods peculiar to the business and practices of life insurance companies, was not only a confirmation of the statements of the local agent, but a direct invitation to pay the premium. A further search for the local agent proving fruitless, Mrs. Nixon transmitted the money through the bank to the general agent, as a payment of the premium.

As shown by the evidence admitted over the objection of plaintiff, the agent, Frost, after he had received and receipted for the premium sent by Mrs. Nixon, "as per telegraphic instructions," wrote a letter to Mr. Nixon (p. 65, Record), in which he announces that he will hold the money "in trust" for him, and encloses blanks to be filled. The witness there stating the contents of the enclosures, to the admission of all which plaintiff objected and excepted, on the ground that the same was irrelevant and immaterial, and that Nixon being dead, the witness could not be heard to testify as to any transactions between them.

On cross-examination, Mr. Frost testified that he received the money, knew that it was sent to be applied as a payment of that premium, and that he had no authority from either Mr. Nixon or Mrs. Nixon to hold or dispose of the same for any other purpose. (Record, p. 115, *et seq.*) He further says (Record, p. 117) that he deposited the money remitted to pay this premium to the credit of his account, *as general agent of the company*, where it remained till he undertook to return it, on May 1st, 1891, by registered letter, after the death of Nixon,

and then without authority, on his own motion, deposited the money in bank at Portland to credit of Mrs. Nixon, where, doubtless, it has since remained.

He further testifies (p. 122, Record) that he made monthly settlements with the company as its general agent, of receipts and disbursements, and remitted balance due.

Whether as a fact he remitted this particular amount into the company's strong box, in San Francisco, is immaterial, Its retention in his general agency account in the bank at Portland was sufficient. If he had suddenly died or resigned, the company could have claimed it of the bank. Besides all this, in his letter of April 30th, 1891, to Mrs. Nixon (Record, p. 77), wherein he attempts to absolve himself from all responsibility, he says: "I have carefully and thoroughly submitted all the facts, correspondence, etc., in this case to the home office," * * * showing conclusively that the company was fully advised, not only of his letter of October 23d, 1890, suggesting payment, but of the remittance, the terms thereof, its acceptance and retention.

The reasonable presumption is that these facts came to the knowledge of the company in the regular course of business as they transpired.

It further appears that this money was retained without further comment or explanation, from the date of its receipt till after the death of Nixon, a period of six months, except that Mrs. Nixon, in ignorance of her rights, wrote to Frost under date of December 22d, 1890 (Record, p. 75), to return the money, *if he did not intend to accept the premium on the policy*, to which he

replied, December 26th (Record, p. 78), suggesting that Mr. Nixon be examined for reinstatement, but saying substantially, that he would return the money if desired, but in such case she would "forfeit her right to restore the policy to risk." To this there was no reply and nothing further occurred till after the death of Nixon, which occurred nearly four months afterwards.

The reasonable inference from all this is, that the company intended to treat this as a payment. If not that, then it intended to hold the matter in such shape that if Mr. Nixon recovered his health it would retain him as a policy-holder, but if he died, the obligation could be denied, and the company could shelter itself from liability by subsequently repudiating the acts of its general agent, done with its knowledge and approval, and by pointing to its talisman, italicized in the brief of its learned counsel, "*that no alteration or waiver of the conditions of this policy shall be valid unless made in writing, at the office of said company in San Francisco, and signed by the president or vice-president, and secretary or assistant secretary.*" This talisman is always kept ready for use and unimpaired by the president and secretary.

Whatever might have been the individual views of agent Frost, it was the clear duty of the company to refund the premium as soon as it was received, if it did not intend to apply it as a payment. Good faith would admit of nothing short of that. This was not done, even after she had conditionally demanded its return. The result is that the company waived the condition as to

prompt payment, and is estopped from a denial of liability.

Upon this question of fact, the actual payment to and the retention of the money by the company, or to its agent, with the knowledge of the company, the decision of the case depended.

The Court instructed the jury, among other things, that the burden was upon the plaintiff; "that she must prove that she actually paid the money, and that the company got it." The Court also further charged the jury that if the money was received by the agent for the company, which he was not authorized at the time to receive, and yet, if he retained and applied it to the use of the company with the knowledge of his superior officers in the company, and if they failed to notify plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received it, then this would amount to a ratification of a previously unauthorized act, and would be as binding as if it had been authorized.

Also, that if plaintiff did notify Frost that the certificates of health could not or would not be furnished, and ask for the return of the money, and it was retained by Mr. Frost, with the knowledge of his superior officers in the company, then he could not be held as acting as agent or trustee for the plaintiff in holding the money, but it would be regarded as money received and retained by the company, and bind it to make an application of it as a payment in accordance with the instruction of plaintiff in sending it.

These questions were submitted to the jury, and they found them in favor of plaintiff.

The charge of the Court covered the whole case and correctly laid down the law applicable to the facts developed in the testimony.

The learned counsel for plaintiff in error, in declaring that "there was absolutely no evidence in the case which would either warrant or justify the Court in suggesting to or instructing the jury what would be the legal consequence if the money had been received or retained by the company, or by any of its principal officers," etc., has inadvertently, we think, misstated the clear meaning of the charge, taken as a whole. And he must have forgotten the undisputed points of testimony showing the payment to the general agent for a specified purpose; his receipt of the same; his deposit of the money with other funds of the company in bank, to his credit as general agent; the retention of it, and failure to return it when demanded, and the contemporaneous knowledge of all these facts by his superior officers, who, as he says, "approved" his acts.

If the doctrine insisted upon by the plaintiff in error in this case shall be established as a precedent, then, no policy-holder will be safe from the time he has paid his premium till another is due. All that will be necessary to destroy his rights by forfeiture, is a little secret collusion between the agent, who has no authority to waive a condition, and the chief officers of the company, who have such authority but never commit themselves in writing.

Counsel for plaintiff in error insists that parties may agree for a lapse of policy on non-payment of premium when due ; that a tender of payment after a forfeiture, which is refused, will not make a waiver ; that sickness and disability will not excuse non-payment, and that the insured is chargeable with knowledge of provisions in his contract.

We agree to all this, and do not criticize the authorities cited. But this is not the issue. The proposition is correctly stated in a case cited by him,—Thompson vs. Life Ins. Co., 104 U. S., 252. In that case, Justice Bradley says : "If a forfeiture is provided for in case of non-payment at the day, the Court can not grant relief against it. *The insurer may waive it, or may by his conduct lose his right to enforce it.*" Aside from the issue tendered by plaintiff below, in reference to the extension of time of payment, and the consequent waiver thereby of prompt payment, the only issue is whether the acceptance and retention of the premium after due by the company, or by its agent with the knowledge of the company's chief officers, was a waiver of prompt payment provided for in the contract?

Upon this question and others connected therewith, we submit the following points and authorities :—

The receipt of a premium on a policy after forfeiture, with knowledge of the facts, is a waiver of the forfeiture.

Viele vs. Germania Ins. Co., 26 Iowa, 55.
Aetna Ins. Co. vs. Maguire, 51 Ills., 242.
Mut. Ben. Life vs. Robertson, 59 Ills., 123.
Trager vs. La. Equitable, 31 La. Ann., 235.

Southern Co. vs. Booker, 9 Heisk., 606.
Schmidt vs. Charter Oak, 2 Mo., App., 339.
Walsh vs. Austin, 30 Iowa, 133.
Ins. Co. vs. McCain, 6 Otto, 84.
Phœnix Ins. Co. vs. Boyer, 27 N. E., 628.
Arnott vs. Prud. Ins. Co., 17 N. Y. S., 710.
De Frece vs. Natl. Life, 19, N. Y. S., 8.

In the note to Viele vs. Germania Ins. Co., *supra*, it is said, "This valuable case contains, it is believed, the most complete and comprehensive view to be found in the decisions of the Courts of the law of waiver of conditions, or of forfeiture by breach of conditions, in policies of insurance."

In that case the Courts say, *inter alia*, that the breach of conditions in the policy by one party does not render the contract *void*, but voidable only, as the other party may waive the forfeiture and treat the contract as binding.

That the waiver need not be in writing.

That acts and declarations, whereby the party was induced to believe that the condition was dispensed with or forfeiture, will be sufficient to preclude the setting up breaches of the condition as a defense.

That the receipt of premium upon a policy after forfeiture is a waiver thereof (citing authorities.)

That an agent with general powers has authority to dispense with conditions and waive the effect of breaches thereof.

As to the power of a general agent to waive a forfeiture:

Ball vs. Ins. Co., 20 Fed. Rep., 232.

Ins. Co. vs. Hayden, 13 S. W., 585.
Murphy vs. Southern Co., 3 Baxter, 440.
Dilleber vs. Knickerbocker Co., 76 N. Y., 567.
Piedmont & Arlington vs. McLean, 31 Gratt., 517.
Ins. Co. vs. Friedenthal, 27, Pac. 88.
Penn. Mut. Life vs. Keach, 26 N. E., 106.

Waiver by ratification of act of agent in receiving premium:

Wyman vs. Phœnix Ins. Co., 119 N. Y., 274.
Piedmont & Arlington vs. Lester, 59 Ga., 812.
Mound City Mutual vs. Huth, 49 Ala., 529.

Denial of liability after notice of death is a waiver of proof of loss:

Van Kirk vs. Ins. Co., 48 N. W., 798.
Phœnix Ins. Co. vs. Batchelder, 49 N. W. 217.
Germania Ins. Co. vs. Gibson, 14 S. W., 672.

The company must declare a forfeiture by some affirmative act, as the provision is made for its benefit:

Ins. Co. vs. French, 30 Ohio St., 240.
Bouton vs. Ins. Co., 25 Conn., 542.
Joliffe vs. Ins. Co., 39 Wis., 117.

If the foregoing authorities establish the propositions contended for by us, there is nothing left open for the contention of plaintiff in error.

The jury has affirmatively passed upon the issues of fact as to the payment of the premium by the plaintiff as such; its receipt and appropriation by the company, and its retention of the same for months after the conditional request to refund it.

It is well settled that this Court will not weigh the evidence.

Ins. Co. vs. Ward, 140 U. S., 76.
N. P. R. R. Co. vs. Charless, 2 C. C. A., 398.
Unsell vs. Ins. Co., 144 U. S., 439.

It is suggested that the verdict is partisan. That suggestion is always made in cases of suits against corporations when the plaintiff below is defendant in error. But it seems to us that no jury would have acted differently under such testimony, and especially when, by the charge of the Court, the defendant's theory was strongly and squarely presented.

In conclusion, it is respectfully submitted that the charge of the Court fairly presented the issues to the jury, so far as the defendant below was concerned, and as to it, fairly and correctly stated the law. That the verdict is responsive to the charge and sustained by the evidence; that there is no reversible error in the record, and that the judgment should be affirmed.

W. S. RELFE,
For Defendant in Error.